REPORTS OF CASES

DETERMINED BY THE

SUPREME COURT

OF THE

STATE OF NEVADA

Volume 128

MICHAEL KEVIN POHLABEL, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 55403

January 26, 2012 268 P.3d 1264

Appeal from a judgment of conviction, pursuant to a guilty plea, of felon in possession of a firearm. Fourth Judicial District Court, Elko County; Andrew J. Puccinelli, Judge.

Defendant was convicted on his plea of guilty in the district court of being a felon in possession of a firearm. Defendant appealed. The supreme court, PICKERING, J., held that: (1) defendant's felon status excepted him from Second Amendment coverage, and (2) unpardoned felons are not included among those to whom the state constitution guarantees the right to keep and bear arms.

Affirmed.

[Rehearing denied March 20, 2012]

Frederick B. Lee, Jr., Public Defender, and *Alina M. Kilpatrick*, Deputy Public Defender, Elko County, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Mark Torvinen*, District Attorney, and *Robert J. Lowe*, Deputy District Attorney, Elko County, for Respondent.

1. CRIMINAL LAW.
   Constitutional challenges to a statute are reviewed de novo.
2. WEAPONS.
   Prosecution of defendant, a convicted felon, for being a felon in possession of a firearm did not violate defendant's Second Amendment right to bear arms, as defendant's felon status excepted him from Second Amendment coverage. U.S. CONST. amend. 2; NRS 202.360(1)(a).
3. CONSTITUTIONAL LAW.
   In interpreting the state constitution, the supreme court is guided by the principle that the constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.
4. CONSTITUTIONAL LAW.
   The goal of constitutional interpretation is to determine the public understanding of a legal text leading up to and in the period after its enactment or ratification.
5. CONSTITUTIONAL LAW.
   When the language of a constitutional provision is unambiguous, its text controls.
6. CONSTITUTIONAL LAW.
   If a constitutional provision's language is ambiguous, meaning that it is susceptible to two or more reasonable but inconsistent interpretations, the court may look to the provision's history, public policy, and reason to determine what the voters intended.
7. WEAPONS.
   For purposes of the provision of the state constitution stating that every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use, and for other lawful purposes, the term ''citizen'' refers to those persons who are members of the state's political community, such that unpardoned felons are not included among those to whom the state constitution guarantees the right to keep and bear arms. Const. art. 1, § 11(1); NRS 202.360(1)(a).

Before the Court EN BANC.

OPINION

By the Court, PICKERING, J.:

Michael Pohlabel pleaded guilty to being a felon in possession of a firearm in violation of NRS 202.360. In doing so, he reserved the right to argue on appeal, as he did unsuccessfully in the district court, that his conviction violates the right to keep and bear arms secured by the Second Amendment to the United States Constitution and by Article 1, Section 11(1) of the Nevada Constitution. Because we reject Pohlabel's argument that, despite his felon status, he has a constitutional right to possess a black powder rifle, we affirm.

I.

The conviction underlying this appeal grew out of a traffic stop in rural Nevada. During the stop, the police spotted a rifle in

the back of the car. Pohlabel told police the rifle was his and that he was taking it with him on a fishing trip. The rifle was an in-line black powder rifle. Seven years earlier, Pohlabel had been convicted of two felony counts of possession of a controlled substance.

NRS 202.360(1)(a) makes it a felony for a convicted felon to ''own or have in his or her possession . . . any firearm.''[1] Charged with violating this statute, Pohlabel moved to dismiss. In support of his position, Pohlabel presented expert testimony concerning black powder rifles (they must be loaded by hand each time a shot is fired, take at least 45 seconds to load, and are hard to conceal) and argued that, given their limitations, black powder rifles pose little threat and should not, and constitutionally cannot, be forbidden to nonviolent felons like himself. While federal law prohibits felons from possessing firearms, it excludes antique and muzzle-loading replica firearms, including black powder rifles like Pohlabel's, from its ban. *See* 18 U.S.C. § 921(a)(3), (16)(C) (2006). To Pohlabel, the fact that federal law permits what Nevada law forbids when it comes to felons possessing black powder rifles demonstrates the lack of basis for, and unconstitutionality of, Nevada law.

The district court denied Pohlabel's motion to dismiss. Thereafter, Pohlabel pleaded guilty but reserved the right to challenge the constitutionality of his conviction on appeal. Pohlabel has remained out of custody pending appeal.

II.

A.

Pohlabel summarizes his argument as follows:

> Because the constitutions of the State of Nevada and the United States make the right to bear arms fundamental, any restriction of the right is subject to strict scrutiny, placing the burden on the State to show that any restriction of the right is ''narrowly tailored'' to serve a ''compelling state interest.'' Keeping felons from possessing black powder rifles does not survive strict scrutiny because they take too much time to load, can only hold one bullet at a time, and are not easily concealable on the person.

(Footnotes omitted.) In Pohlabel's view, ''[i]t would be easier to rob a liquor store or mug a tourist with a bow and arrow than a black powder rifle.''

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[1]*Gallegos v. State*, 123 Nev. 289, 163 P.3d 456 (2007), invalidated paragraph b of NRS 202.360(1) as unconstitutionally vague because it did not define ''fugitive from justice.'' This holding does not affect the paragraph at issue here, NRS 202.360(1)(a). In refusing to incorporate federal definitions into NRS 202.360, however, *Gallegos* implicitly rejects Pohlabel's argument that we should read into NRS 202.360(1)(a) the federal definition of ''firearm.''

[Headnote 1]

Pohlabel's argument, however well-articulated, makes a fatal mistake: It assumes that the constitutional right to keep and bear arms applies to felons on equal terms with other citizens. This assumption is insupportable. The Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), lays to rest the argument that the Second Amendment only protects gun rights associated with militia service. But the core individual right *Heller* recognizes—the ''right of law-abiding, responsible citizens to use arms in defense of hearth and home,'' *id.* at 635—categorically, or at least ''presumptively,'' *id.* at 627 n.26, does not extend to felons, *id.* at 626-27. And judged by its text and the evident understanding of the voters who adopted it in 1982, Article 1, Section 11(1) of the Nevada Constitution similarly disqualifies felons from the right to keep and bear arms. Applying the de novo review appropriate to constitutional challenges, *Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007), we therefore reject Pohlabel's strict scrutiny approach and uphold the constitutionality of NRS 202.360(1)(a).

B.

The Second Amendment provides: ''A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.'' U.S. Const. amend. II. *Heller* holds, based on ''both text and history, that the Second Amendment confer[s] an individual right to keep and bear arms,'' unconnected from militia service, for the ''core lawful purpose of self-defense'' in the home. 554 U.S. at 595, 630. Two years after *Heller*, *McDonald v. Chicago*, 561 U.S. 742 (2010) (plurality opinion), declared that ''the right to keep and bear arms [is] among those fundamental rights necessary to our system of ordered liberty,'' *id.* at 778, and that ''the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*,'' making it applicable to the states. *Id.* at 791.

Heller characterizes the Second Amendment as guaranteeing ''the right of *law-abiding*, *responsible* citizens to use arms in defense of hearth and home.'' 554 U.S. at 635 (emphasis added). It contrasts this category of citizens, whose gun rights the Second Amendment protects (the ''law-abiding'' and ''responsible''), with ''felons and the mentally ill,'' whom the government may prohibit from possessing firearms:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon

> whatsoever in any manner whatsoever and for whatever purpose. . . . [*N*]*othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons* and the mentally ill.

Id. at 626 (emphasis added). In a footnote, the Court explains that its list of ''presumptively lawful regulatory measures'' is illustrative and not exhaustive. *Id*. at 627 n.26. *McDonald* reiterates that ''the right to keep and bear arms is not 'a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose' '' and that neither *Heller* nor *McDonald* ''cast[s] doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill.' '' 561 U.S. at 786 (quoting *Heller*, 554 U.S. at 626).

Heller's declaration that the government can prohibit felons, categorically, from possessing firearms cannot be dismissed as dicta. The opinion conditioned Heller's right to keep a loaded handgun in his home on him not being ''*disqualified* from the exercise of Second Amendment rights,'' 554 U.S. at 635 (emphasis added)—that is, he qualified for the relief the Court granted him only ''if he is not a felon and is not insane.'' *Id*. at 631. *Heller*'s statement about felon-disqualification thus is not dicta; it limits the very relief Heller won. *See United States v. Barton*, 633 F.3d 168, 172 (3d Cir. 2011) (''the Supreme Court's discussion in *Heller* of the categorical exceptions to the Second Amendment was not abstract and hypothetical; it was outcome-determinative''); *United States v. Rozier*, 598 F.3d 768, 771 n.6 (11th Cir. 2010) (''[t]o the extent that . . . *Heller* limits the Court's opinion to possession of firearms by *law-abiding* and *qualified* individuals, it is not dicta''); *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010) (under *Heller*, ''felons are categorically different from the individuals who have a fundamental right to bear arms''; this holding is not dicta because if Heller proved to be a felon or insane, he was ''disqualified'' from Second Amendment protection); *see also United States v. Marzzarella*, 614 F.3d 85, 90 n.5 (3d Cir. 2010) (collecting cases and noting that '' 'there is dicta and then there is dicta, and then there is Supreme Court dicta' '' (quoting *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006)).

We recognize, as the Third Circuit did in *Marzzarella*, that *Heller*'s footnoted reference to felon-dispossession laws, among others, being ''presumptively lawful'' could mean one of two different things. ''On the one hand, this language could be read to suggest the identified restrictions''—here, a prohibition against felons possessing any type of firearm—''are presumptively lawful because they regulate conduct outside the scope of the Second Amendment.'' *Marzzarella*, 614 F.3d at 91. On the other hand, it

may mean that such restrictions ''are presumptively lawful because they pass muster under any standard of scrutiny.'' *Id.* Although both readings are reasonable, ''the better reading, based on the text and the structure of *Heller*, is the former—in other words, that these longstanding limitations are exceptions to the right to bear arms.'' *Id.* We agree. *Heller* does not treat felons (and the mentally ill) as having qualified Second Amendment rights but, rather, as ''exceptions'' to its coverage. 554 U.S. at 635. This comports with the *Heller* majority's categorical approach—and consequent, emphatic rejection of the judicial balancing advocated by the dissent. *Id.*; *see* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. Rev. 375, 375, 405 (2009) (''[f]rom its central holding, which extends broad protection to the 'individual' right to bear arms unconnected from militia service, to its flat exclusions of felons, the mentally ill, and certain 'Arms' from constitutional coverage, the majority opinion in *Heller* was categorical in its approach''; ''[t]he least discussed element of *District of Columbia v. Heller* might ultimately be the most important: the battle between the majority and dissent over the use of categoricalism and balancing in the construction of constitutional doctrine'').

Marzzarella suggests ''a two-pronged approach to Second Amendment challenges.'' 614 F.3d at 89. First, the reviewing court must determine ''whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee.'' *Id.* If it does not, the inquiry ends. If the challenged law does burden protected conduct, the court must ''evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid.'' *Id.*

[Headnote 2]

In this case, the Second Amendment inquiry ends with the first question. Pohlabel is a felon who violated NRS 202.360(1)(a), which prohibits a felon from possessing ''any firearm,'' ''loaded or unloaded and operable or inoperable,'' NRS 202.360(3)(b), including a black powder rifle. *See Harris v. State*, 137 P.3d 124, 128-29 (Wyo. 2006) (Wyoming's felon-dispossession statute, which, like Nevada's, prohibits felons from possessing ''any firearm,'' Wyo. Stat. Ann. § 6-8-102, encompasses black powder rifles, which meet standard dictionary definitions of ''firearm'' because they are ''capable of firing a projectile by using an explosive as a propellant'' (internal quotation omitted)); NRS 202.253(2) (''[f]irearm' means any device designed to be used as a weapon from which a projectile may be expelled through the barrel by the force of any explosion or other form of combustion''). Although critics of *Heller* have questioned its historical analysis of felon-

dispossession laws (and whether it makes sense to apply them to regulatory felonies unknown at common law), *see* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 697, 699-713 (2009), *Heller* confirms that Nevada can, consistent with the Second Amendment, prohibit convicted felons from possessing firearms. Means-end scrutiny, whether strict or intermediate, does not apply.[2]

In so holding, we recognize but do not credit Pohlabel's argument that three features of his case overcome NRS 202.360(1)(a)'s presumptive lawfulness: (1) his predicate convictions did not involve violence,[3] (2) his record was clean for the seven years that elapsed between his felony convictions and his arrest for violating Nevada's felon-in-possession law, and (3) black powder rifles are clumsy and ill-suited to criminal endeavor. The problem with each of these proffered distinctions is that none brings Pohlabel, a convicted felon, within the ambit of the Second Amendment.

Pohlabel's first and second points demonstrate, not so much the lack of justification for applying Nevada's felon-in-possession law to him, as his arguable eligibility for executive clemency or pardon. But the statute under which Pohlabel was convicted recognizes that a rehabilitated felon can have his right to keep and bear arms restored. *See* NRS 202.360(1)(a) (it is a felony to possess ''any firearms if the person . . . has been convicted of a felony . . . , *unless the person has received a pardon and the pardon does not restrict his or her right to bear arms*'' (emphasis added)). The statutory scheme commits the determination, though, to the pardons board; the lost right must be restored before it can be exercised. NRS 202.360(1)(a) ''suggests that [the Legislature] clearly intended that [a] defendant clear his status'' by having his rights restored ''*before* obtaining a firearm, thereby fulfilling [the Legislature's evident] purpose 'broadly to keep firearms away from the persons [the Legislature] classified as potentially irresponsible and dangerous.' '' *Lewis v. United States*, 445 U.S. 55, 64-65 (1980) (quoting *Barrett v. United States*, 423 U.S. 212, 218 (1976)). The legislative judgment ''that a convicted felon . . . is

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[2]The fact that Pohlabel's case falls squarely within *Heller*'s list of ''presumptively lawful'' exceptions to the Second Amendment distinguishes cases like *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010), which applied intermediate scrutiny to a Second Amendment challenge by a misdemeanant convicted of domestic violence, whom 18 U.S.C. § 922(g)(9) (2006) prohibits from carrying firearms in or affecting interstate commerce.

[3]Because we sustained Pohlabel's objection to the State's motion to supplement the record with Pohlabel's presentence investigation report, we express no opinion on, but accept for discussion purposes only, the accuracy of Pohlabel's characterization of his criminal history as nonviolent. *See also United States v. Torres-Rosario*, 658 F.3d 110, 113 (3d Cir. 2011) (rejecting argument that possession with intent to distribute controlled substances did not involve the threat of violence).

among the class of persons who should be disabled from dealing in or possessing firearms because of potential dangerousness is rational.'' *Id.* at 67 (upholding conviction under federal felon-dispossession law even though the predicate felony was the result of an uncounseled guilty plea and thus subject to collateral attack). Under *Heller*, given Pohlabel's felon status, more is not required. *See United States v. Torres-Rosario*, 658 F.3d at 113 & n.1 (noting that ''[a]ll of the circuits to face the issue post-*Heller* have rejected blanket challenges to felon in possession laws'' (collecting cases)).[4]

As for the distinction between a black powder rifle and other types of firearm, Pohlabel's argument is illogical, since *Heller* focuses on the right of self-defense and, by Pohlabel's own admission, black powder rifles take too long to load and are too hard to conceal to be helpful in armed confrontations. More fundamentally, unless Pohlabel can bring himself within the protections of the Second Amendment despite his felon status—he has not—the heightened scrutiny that would invite judicial reassessment of ostensibly legitimate, legislative line-drawing does not obtain. *Cf. Rozier*, 598 F.3d at 771 (rejecting the argument by a felon in possession of a firearm that, notwithstanding *Heller*'s categorical exclusion of felons from the Second Amendment, he could not constitutionally be denied the core right to possess a handgun in his home for self-defense; under *Heller*, ''statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment'').

While federal law currently permits felons to possess black powder rifles, that does not mandate that Nevada follow suit. *See Harris*, 137 P.3d at 129 (rejecting argument that the Wyoming Supreme Court should adopt the federal definition of firearm in 18 U.S.C. § 921(a), when its legislature did not). The choice as to whether to deny felons the right to possess any and all firearms, as Nevada has done, or to permit them to possess antique firearms and black powder rifles, as Congress has done, is legislative, not judicial. Without a constitutional imperative demanding more ex-

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[4]Citing *Britt v. State*, 681 S.E.2d 320 (N.C. 2009), *Torres-Rosario* recognizes that the Supreme Court may yet be open to claims that ''some felonies do not indicate potential violence and cannot be the basis for applying a categorical ban'' or even ''highly fact-specific objections,'' such as the 30 years that had elapsed, crime-free, between Britt's single predicate conviction and firearm charge. 658 F.3d at 113. However, it noted that ''such an approach, applied to countless variations in individual circumstances, would obviously present serious problems of administration, consistency and fair warning.'' *Id.* In our judgment, the pardon and collateral review avenues, which *Lewis*, 445 U.S. at 67, and NRS 202.360(1)(a) require a convicted felon to pursue to successful conclusion *before* acquiring a firearm, adequately address the problem *Britt* treats, without introducing the uncertainty and administrative difficulties *Torres-Rosario* predicts.

acting review, such distinctions do not invalidate state laws that differ from their federal counterpart. *See* 18 U.S.C. § 927 (2006) (''No provisions of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field . . . to the exclusion of the law of any State on the same subject matter''); *United States v. Haddad*, 558 F.2d 968, 973 (9th Cir. 1977) (federal gun laws are not ''an encroachment on, but rather a complement to, state regulation'').

C.

We turn next to Article 1, Section 11(1) of the Nevada Constitution, which provides: ''Every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes.'' Pohlabel argues that, despite his felon status, he is a Nevada ''citizen'' and thus has the right ''to keep and bear arms for security and defense [and] for lawful hunting and recreational use.'' The State counters that the Nevada Constitution only guarantees ''lawful'' possession of firearms and that, under NRS 202.360(1)(a), Pohlabel's possession of the black powder rifle was unlawful and thus unprotected. While we conclude that Article 1, Section 11(1), like the Second Amendment, categorically disqualifies felons from the gun rights it secures, we do not accept either side's reading of its text.

[Headnotes 3-6]

''In interpreting [Article 1, Section 11(1)] we, like the United States Supreme Court, 'are guided by the principle that [t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.' '' *Strickland v. Waymire*, 126 Nev. 230, 234, 235 P.3d 605, 608 (2010) (second alteration in original) (quoting *Heller*, 554 U.S. at 576). ''The goal of constitutional interpretation is 'to determine the public understanding of a legal text' leading up to and 'in the period after its enactment or ratification.' '' *Id*. at 234, 235 P.3d at 608-09 (quoting 6 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 23.32 (4th ed. 2008 & Supp. 2010)). When the language of a constitutional provision is unambiguous, its text controls. *Secretary of State v. Burk*, 124 Nev. 579, 590, 188 P.3d 1112, 1120 (2008). Conversely, ''[i]f a constitutional provision's language is ambiguous, meaning that it is susceptible to 'two or more reasonable but inconsistent interpretations,' we may look to the provision's history, public policy, and reason to determine what the voters intended.'' *Id*. (quoting *Gallagher v. City of Las Vegas*, 114 Nev. 595, 599, 959 P.2d 519, 521 (1998)).

We begin with the State's argument that ''the rights involved in Article 1, § 11 are limited to *lawful possession*'' and that because

''[t]he legislature has made it illegal for felons . . . to possess firearms,'' the constitutional guarantee does not apply. The State's reading gives the Legislature the exclusive authority to determine when it is ''lawful'' to possess a firearm and when it is not. But this is not what the Constitution says. ''Lawful'' does not modify ''possession'' in Article 1, Section 11(1); it modifies ''purposes,'' which itself is limited by appearing at the end of a list: ''Every citizen has the right to keep and bear arms *for* security and defense, *for* lawful hunting and recreational use and *for other lawful purposes*.'' (Emphasis added.) The phrase ''other lawful purposes'' gives the Legislature the authority to expand the lawful purposes for which a citizen may keep and bear arms, but it does not authorize the Legislature to diminish them. Any other reading would reduce the constitutional guarantee to nothing more than what the Legislature permits, making it meaningless. This ''simply cannot be correct,'' *United States v. Lopez*, 514 U.S. 549, 589 (1995) (Thomas, J., concurring).

Article 1, Section 11(1)'s history supports our rejection of the State's lax reading of it. Unlike many other states, whose constitutions have secured gun rights from statehood days, Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. L. & Pol. 191, 193-204 (2006) (cataloguing state constitutional provisions), the Nevada Constitution did not guarantee the right to keep and bear arms until 1982, when voters overwhelmingly (162,460 to 66,385) approved Article 1, Section 11(1), as proposed by the 1979 and 1981 Nevada Legislatures. *See* Questions to Be Voted Upon in State of Nevada at General Election, November 2, 1982, Question No. 2 (available at Nevada Legislative Counsel Bureau Research Library) (hereafter, ''1982 Questions to Be Voted Upon''). The 1982 ballot materials told voters that the amendment, as proposed, meant that ''[t]he legislature could not restrict the enumerated purposes, but could make others lawful.'' *Id*. *See also* Hearing on A.J.R. 6 Before the Assembly Judiciary Comm., 60th Leg. (Nev., January 23, 1979) (the amendment was proposed ''so that a future Legislature could not come in and easily change the law to allow some type of control [over firearms]''); *id*. (its purpose was to safeguard individual rights and make it difficult ''for a future Legislature . . . to change the law'').

Although we reject the State's position, we are also not persuaded by Pohlabel's argument that Article 1, Section 11(1)'s reference to ''every citizen'' includes him, an unpardoned felon. The word ''every'' is self-explanatory. However, the word ''citizen'' is subject to two reasonable, but inconsistent, interpretations. Because of this ambiguity, it is unclear whether the voters

understood ''citizens'' to include ''felons'' when they adopted Article 1, Section 11(1) in 1982.[5]

One way to read the word ''citizen'' is as a ''generic substitute for 'accused,' 'person,' 'defendant,' or 'individual.' '' M. Isabel Medina, *Ruminations on the Fourth Amendment: Case Law, Commentary, and the Word ''Citizen,''* 11 Harv. Latino L. Rev. 189, 192 (2008). For example, the Nevada Constitution often uses the words ''citizen'' and ''people'' interchangeably. *Compare* Article 1, Section 9 (''Every citizen may freely speak, write and publish . . . .'') *with* Article 1, Section 10 (''The people shall have the right freely to assemble . . . .''). Similarly, the word ''citizen'' may be used in reference to a civilian, a person who is not a specialized servant of the state. *Webster's II New College Dictionary* 209 (3d ed. 2005). *See, e.g.*, *Carrigan v. Commission on Ethics*, 126 Nev. 277, 236 P.3d 616 (2010) (contrasting elected board members with citizens), *rev'd*, 564 U.S. ___, 131 S. Ct. 2343 (2011); *Las Vegas Police Prot. Ass'n v. Dist. Ct.*, 122 Nev. 230, 130 P.3d 182 (2006) (discussing a citizen's complaint against the police board).

A second meaning of ''citizen'' is ''[a] person who . . . is a member of a political community, owing allegiance to the community and being entitled to enjoy all its civil rights and protections; a member of a civil state, entitled to all its privileges.'' *Black's Law Dictionary* 278 (9th ed. 2009). Under this definition, ''citizenship is a status, which entails individuals to a specific set of universal rights granted by the state.'' Jason Schall, *The Consistency of Felon Disenfranchisement With Citizenship Theory*, 22 Harv. BlackLetter L.J. 53, 69 (2006) (quotation omitted). Often, these rights align with the ''most basic of American political behaviors—voting and participation in the political process.'' Medina, *supra*, at 202.

Because of this ambiguity, it is appropriate to look at the context and history of Article 1, Section 11(1) in determining whether ''every citizen'' includes felons.

Upon conviction, a felon loses many precious civil rights. Thus, in Nevada, a felon may not vote (*see* NRS 176A.850; Nev. Const. art. 2, § 1), serve on a jury (NRS 6.010), hold a public office (*see, e.g.*, NRS 253.010), be employed in sensitive positions, such as peace officer or licensed school teacher (NRS 289.555; NRS 391.033), or, as this case illustrates, possess firearms (NRS

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[5]Nevada is one of the 16 states that constitutionally limits the right to bear arms to ''citizens.'' The remaining 26 state constitutional provisions specify state citizens or use the words ''people,'' ''person,'' ''individual,'' or ''men.'' *See* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. L. & Pol. 191, 193-204 (2006).

202.360(1)(a)).[6] Historically, Nevada's pardon statutes have referred to these lost rights as rights of ''citizenship'' that it takes a pardon (or reversal of conviction) to restore. *See* 2 Nev. Compiled Laws § 3797 (1873) (''When a pardon is granted for any offense committed, such pardon may or may not include restoration to citizenship. If the pardon include restoration to citizenship, it shall be so stated in the instrument or certificate of pardon; and when granted upon conditions, limitations, or restrictions, the same shall be fully set forth . . . .''); 1931 NCL § 11573 (also referring to ''restoration of citizenship''); 1973 Nev. Stat., ch. 804, § 4, at 1845 (same). Although the current version of this statute refers to the restoration of a convicted person's ''civil rights,'' including, specifically, the right to bear arms, *see* NRS 213.090, the reference to ''restoration to citizenship'' survives in its companion, NRS 213.030(1), and existed in NRS 213.090 up until 1977, the session preceding that in which what became Article 1, Section 11(1) was first proposed. 1977 Nev. Stat., ch. 367, § 1, at 665. This equation—of lost rights of ''citizenship'' with the rights an unpardoned felon loses by reason of his conviction—existed in Nevada law for the century preceding the addition of Article 1, Section 11(1) to the Nevada Constitution. Since gun rights are among the rights of ''citizenship'' or the ''civil rights'' that a felon has historically been seen as losing by reason of conviction in Nevada, it is reasonable to read the reference to ''every citizen'' in Article 1, Section 11(1) to exclude unpardoned felons.[7]

This interpretation of Article 1, Section 11(1) comports with the voter's evident understanding of it. Thus, the voters who approved its adoption were assured in the ballot materials that ''[s]imilar language in other state constitutions has not been interpreted by the courts to prevent prohibiting . . . (2) the possession of weapons by convicted felons.'' 1982 Questions to Be Voted Upon, Explanation. *See also Strickland*, 126 Nev. at 239 & n.3, 235 P.3d at 611 & n.3

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[6]Nevada's felon-dispossession statute dates back at least to 1925. *See* 1925 Nev. Stat., ch. 47, § 2, at 54 (prohibiting felons from possessing a ''pistol, revolver, or other firearm capable of being concealed on the person''). We acknowledge that this provision formerly only applied to concealable ''firearms having a barrel less than twelve inches in length,'' *id.*, and that NRS 202.360(1)(a) did not prohibit felons from possessing *any* firearms until 1985. *See* 1985 Nev. Stat., ch. 160, § 3, at 594. The Legislature's broadening of the felon-dispossession statute over time does not alter our conclusion that, as felons are not ''citizens'' within the meaning of Article 1, Section 11(1), the state may prohibit them from possessing firearms, regardless of type. *See Rozier*, 598 F.3d at 770, and text accompanying note 4, *supra* p. 8.

[7]Article 1, Section 11(1)'s use of the phrase ''every citizen'' where the Second Amendment uses the more inclusive phrase, ''the people,'' simplifies our interpretive task. For a general discussion see Pratheepan Gulasekaram, *''The people'' of the Second Amendment: Citizenship and the Right to Bear Arms*, 85 N.Y.U. L. Rev. 1521 (2010).

(consulting ballot materials to disambiguate a Nevada constitutional amendment passed by popular vote).

Finally, the legislative history also supports our conclusion. Thus, some members of the 1979 and 1981 Legislatures expressed concern that the proposal that became Article 1, Section 11 could invalidate Nevada's felon-dispossession law. Hearing on A.J.R. 6 Before the Assembly Judiciary Comm., 60th Leg. (Nev., February 26, 1979); Hearing on A.J.R. 6 Before the Senate Judiciary Comm., 60th Leg. (Nev., April 26, 1979); Hearing on A.J.R. 6 Before the Senate Judiciary Comm., 61st Leg. (Nev., February 25, 1981); *but see* Senate Journal, 61st Leg., at 273 (March 6, 1981) (Senator Neal expressed the view that a felon is not a citizen and would not be allowed to carry a weapon unless he ''has gained his citizenship back.'').[8] To assuage these concerns, the Senate Judiciary Committee asked the legislative counsel bureau for a legal interpretation of the amendment. The legislative counsel offered the opinion that similar provisions in other states did not prohibit reasonable regulations, including those that prohibit felons from keeping or bearing arms. Hearing on A.J.R. 6 Before the Senate Judiciary Comm., 61st Leg. (March 3, 1981).

[Headnote 7]

Together, these publicly available materials convince us that the Legislature and the voters used the word ''citizen'' in Article 1, Section 11(1) to refer to those persons who are members of our political community and that unpardoned felons are not included among those to whom the Nevada Constitution guarantees the right to keep and bear arms.

For these reasons, we affirm.

SAITTA, C.J., and DOUGLAS, CHERRY, GIBBONS, HARDESTY, and PARRAGUIRRE, JJ., concur.

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[8]Pohlabel argues that the Legislature intended to follow federal law and did not specifically omit felons from the amendment because federal law already prohibited felons from possessing guns. Although we agree that some legislators discussed federal law, we do not find this discussion particularly helpful. Furthermore, at the time voters approved the Nevada constitutional provision for the right to bear arms, it was still illegal for a felon to possess a black powder rifle under federal law. 18 U.S.C. § 922(h)(1) (1976).

IN THE MATTER OF PARENTAL RIGHTS AS TO
S.M.M.D. AND T.A.D.

RAENA R., APPELLANT, *v.* STATE OF NEVADA; TED R.;
AND RAELYNN R., RESPONDENTS.

No. 55541

January 26, 2012 272 P.3d 126

Appeal from a district court order denying, based on lack of subject matter jurisdiction, appellant's petition to vacate its earlier certification of her relinquishment of parental rights. Third Judicial District Court, Churchill County; Leon Aberasturi, Judge.

State filed petition seeking termination of parental rights of Indian children. Before the termination hearing concluded, mother voluntarily relinquished her rights to the children, which the court accepted. Thereafter, mother filed petition to set aside her relinquishment under the Indian Child Welfare Act (ICWA). The district court denied petition based on lack of subject matter jurisdiction. Mother appealed. The supreme court, PICKERING, J., held that (1) ICWA applied to the proceedings, though children did not initially qualify for tribal enrollment, (2) tribal-state agreement that termination of mother's parental rights would proceed in state district court vested the district court with subject matter jurisdiction to accept mother's voluntary relinquishment of her parental rights, (3) the district court was not deprived of jurisdiction over the proceeding on basis that neither the mother nor the tribe received proper notice of the proceeding under ICWA's notice provision, and (4) the district court was not deprived of jurisdiction over termination proceeding on basis that the tribe did not receive proper notice of proceeding under state notice statute.

Affirmed.

Donald K. Pope, Reno, for Appellant.

Catherine Cortez Masto, Attorney General, and *Sharon L. Benson*, Deputy Attorney General, Carson City, for Respondent State of Nevada.

Ernest E. Adler, Carson City, for Respondents Ted R. and Raelynn R.

1. INDIANS.

The supreme court, on mother's appeal of the district court's denial of her petition to vacate its certification of her voluntary relinquishment of parental rights on basis that the district court lacked jurisdiction under the Indian Child Welfare Act to accept her relinquishment, had jurisdiction to determine whether the district court had jurisdiction over the proceeding at the outset, as the supreme court inherently possessed jurisdic-

tion to determine jurisdiction. Indian Child Welfare Act of 1978, § 2 *et seq.*; 25 U.S.C. § 1901 *et seq.*

2. INDIANS.
   Under the Indian Child Welfare Act, state courts are courts of limited jurisdiction. Indian Child Welfare Act of 1978, § 2 *et seq.*; 25 U.S.C. § 1901 *et seq.*
3. COURTS.
   The courts inherently possess jurisdiction to determine jurisdiction.
4. COURTS.
   Jurisdiction over the subject matter of the controversy, when absent, means the court cannot decide the case on the merits.
5. INDIANS.
   Indian Child Welfare Act (ICWA) applied in termination of parental rights proceeding, though children did not initially qualify for tribal enrollment as the children became ''Indian children'' for ICWA purposes when Indian tribe later determined that the children were eligible for enrollment in tribe before the termination hearing occurred. Indian Child Welfare Act of 1978, § 4(1)(ii), (4); 25 U.S.C. § 1903(1)(ii), (4).
6. INDIANS.
   Tribal-state agreement that termination of mother's parental rights to Indian children would proceed in state district court and the placement and adoption of the children, if necessary, would proceed in tribal court vested the district court with subject matter jurisdiction to accept mother's voluntary relinquishment of her parental rights, even though Indian tribe would have exclusive jurisdiction over the termination proceeding absent the agreement, as the Indian Child Welfare Act (ICWA) authorized jurisdictional agreements for concurrent state and tribal jurisdiction by agreement on a case-by-case basis and preserved inherent tribal sovereignty to determine that state social services and the courts, on a case-by-case basis, could be helpful. Indian Child Welfare Act of 1978, §§ 101(a), (b), 109(a); 25 U.S.C. § 1911(a), (b), 1919(a).
7. STATUTES.
   The supreme court, when construing a statute, presumes that the legislature says in a statute what it means and means in a statute what it says.
8. STATUTES.
   The supreme court's inquiry when construing a statute begins with the statutory text and ends there, if the text is unambiguous.
9. STATUTES.
   The supreme court generally avoids statutory interpretation that renders language meaningless or superfluous.
10. INDIANS.
    Notice provision of Indian Child Welfare Act, requiring notice by registered mail with return receipt requested to the Indian child's parent and tribe of pending termination of parental rights proceedings and of their right of intervention, apply to proceedings that begin as involuntary terminations but result in voluntary terminations. Indian Child Welfare Act of 1978, § 102(a); 25 U.S.C. § 1912(a).
11. INDIANS.
    The district court was not deprived of jurisdiction over termination of parental rights proceeding involving Indian children on basis that neither the mother nor the tribe received proper notice of the proceeding under the notice provision of the Indian Child Welfare Act (ICWA), which required notice by registered mail with return receipt requested to the Indian child's parent and tribe of pending termination proceedings and of their right of intervention, as mother and tribe had actual notice of the termi-

nation proceeding, which constituted substantial compliance with ICWA, in that the mother appeared and participated, and the tribe agreed to the district court's exercise of jurisdiction. Indian Child Welfare Act of 1978, § 102(a); 25 U.S.C. § 1912(a).

12. INDIANS.

The district court was not deprived of jurisdiction over termination of parental rights proceeding involving Indian children on basis that the tribe did not receive proper notice of the proceeding under state statute providing that in termination of parental rights proceedings involving Indian children, the district court is required to cause the Indian child's tribe to be notified in writing in the manner provided in the Indian Child Welfare Act (ICWA), as the tribe had actual notice of the termination proceedings from the State, which satisfied ICWA, and the state statute reinforced ICWA. Indian Child Welfare Act of 1978, § 102(a); 25 U.S.C. § 1912(a); NRS 128.023.

Before the Court EN BANC.

OPINION

By the Court, PICKERING, J.:

This appeal requires us to decide whether, under section 1919 of the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1963 (2006), a tribal-state agreement respecting child custody proceedings may vest a Nevada district court with subject matter jurisdiction to take a relinquishment of parental rights under circumstances where section 1911(a) of the ICWA, 25 U.S.C. § 1911(a), would otherwise lay exclusive jurisdiction with the tribal court. We conclude that the ICWA, in keeping with fundamental principles of tribal autonomy, allows for tribal-state agreements for concurrent jurisdiction even when the tribe would have exclusive jurisdiction absent an agreement. Therefore, we affirm.

I.

This case has a long history. In September 2002, the social services division of the Fallon Paiute Shoshone Tribe (the tribe) removed S.M.M.D. and T.A.D. (the children) on an emergency basis from their mother Raena, who lived on the reservation with them and is a member of the tribe. Tribal social services returned the children to Raena but their situation did not stabilize. In July 2003, Nevada Department of Child and Family Services (DCFS) and tribal social services undertook a joint investigation of the children's welfare; this culminated in the tribe removing the children for a second time in December 2003. Because the children did not meet the tribe's then-applicable blood quantum requirement for membership, tribal social services ceded custodial oversight to DCFS.

The children were returned to Raena but renewed concern for the children's welfare led tribal social services and DCFS to con-

duct a second joint investigation. In December 2004, this investigation ended like the first, with DCFS entering the reservation with the tribe's permission and taking custody of the children; in January 2005, child welfare dependency proceedings were brought in state court. DCFS and the district court established a case plan for Raena but placed the children with foster parents Tim and Mayris T. of Fallon (the foster parents). The court held periodic reviews to monitor the children and to measure Raena's progress. Each time, the district court reassessed the ICWA's applicability and, until January 2006, concluded that the tribe did not have jurisdiction over the children because they did not meet its blood quantum requirements for eligibility.

Some time before January 2006,[1] the tribe changed its blood quantum requirements. This change made the children eligible for tribal membership and brought them within the purview of the ICWA. In January 2006, the district court determined that the children were ''Indian children'' subject to the ICWA, 25 U.S.C. §§ 1901-1963, and it found that Raena had failed to make ''normal parental adjustments.'' DCFS decided to pursue termination of her parental rights.

Coordination between tribal social services and DCFS continued. DCFS notified the tribe that it was pursuing termination of Raena's parental rights and invited the tribe to intervene. Interim tribal social services director Melanie Arragon replied that the tribe was willing to address parental rights but that ''if this process ha[d] already begun with the state the tribal social services would like the process to continue.'' The tribal court issued an order in February 2006 declaring the children wards of the tribe but that the tribe's ''legal and physical custody'' of the children was ''concurrent with the State of Nevada [and DCFS]'' and ''the current plan and placement of [the children] is appropriate and approved to address termination of parental rights.''

The process continued in state court, with DCFS social worker Rhonda Felix and tribal social services director Bonnie Rushford maintaining the state-tribal communication. Felix attended at least two meetings with the tribe and made several appearances in tribal court. In June 2006, DCFS notified the district court that ''[a] joint decision [had been] made to continue with the Division of Child and Family Services maintaining jurisdiction with the Fallon

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[1]The precise date of the change in eligibility requirements is not clear. However, the evidence indicates that the change occurred at the latest by January 2006. The district court was aware of the children's eligibility by then and DCFS and tribal social services communicated by letter about the tribe's intentions regarding jurisdiction that month. The children were enrolled as members of the Paiute Shoshone Tribe of the Fallon Reservation on March 14, 2006.

Paiute Shoshone Tribal Social Services being a co-agent and lending support.''

In December 2006, DCFS petitioned the district court to terminate Raena's parental rights over the children. Its petition advised that ''[u]pon a termination of parental rights hearing being set the Fallon Paiute Shoshone Tribal court will schedule a Status hearing to receive an update on what is occurring. . . .'' And in January 2007—as DCFS predicted—the tribal court held a status hearing. The tribal court determined that the tribe and state maintained concurrent ''legal and physical custody'' over the children and that the ''current plan and placement of [the children] . . . is appropriate'' and it ''approved'' the ''termination petition . . . proceeding in the state court.''

The termination hearing proceeded in state court on March 5, 2007. Raena attended with counsel. Before the hearing concluded and after consulting with her counsel, Raena elected to voluntarily relinquish her parental rights. The district court canvassed Raena to ensure that her relinquishment was knowing, voluntary, and free of undue influence. The court accepted the voluntary relinquishment, also terminated the father's parental rights, and placed the children with DCFS. In June 2007, the district court ordered that ''legal and physical custody of [the children] be returned to the Fallon Paiute Shoshone Tribal Social Services.'' The tribal court then entered an order accepting ''all jurisdiction over these proceedings.''[2] In March 2008, the tribal court, after a hearing, ordered the adoption of S.M.M.D. and T.A.D. to respondents Ted and Raelynn R.

When Raena relinquished her parental rights, she had assumed that the children's foster parents would become their adoptive par-

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[2]The record on appeal includes tribal court documents that were not before the district court. Although this court generally will not consider documents not part of the record below, *Toigo v. Toigo*, 109 Nev. 350, 350, 849 P.2d 259, 259 (1993), these documents would be appropriate subjects for judicial notice, if they were complete and adequately authenticated, *see* NRS 47.130, NRS 47.150; *Mack v. Estate of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009), but they are not.

We note in particular the motion to dismiss that asserts that, after the briefing was completed in this case, the tribal court, on remand from the tribal appeals court, rejected Raena's parallel challenge to the state court's termination order. If established—the record is incomplete—such a ruling would lead us to the same conclusion, albeit on alternative grounds, to wit: (1) either the state courts are wholly without jurisdiction to address custody further, the tribe having exercised jurisdiction over it; or (2) the tribe's decision as to the validity of the parental rights termination commands full faith and credit, under 25 U.S.C. § 1911(d). Because the record on appeal of the tribal court decisions and arguments made there is insufficient for this court to adequately assess these arguments and further delay and litigation in this matter is unfair to the participants, especially the children, we affirm based on 25 U.S.C. § 1919.

ents. Disappointed that they did not, Raena returned to state district court and asked that court to set aside her relinquishment under ICWA, 25 U.S.C. § 1914. She maintained that the district court had not had jurisdiction to take her relinquishment, invalidating it.[3] The district court heard arguments and denied the petition. It found that ''Tribal Social Services and State Social Services were in agreement that the Termination of Parental Rights should proceed in State District Court and the placement and adoption of the children, if necessary, would proceed in the Tribal Court.'' Ultimately, the district court determined that it was not a court of competent jurisdiction under section 1914 to void the termination.

Raena appeals the district court's denial of her petition.

II.

Raena presents three arguments for invalidating the district court's taking of her relinquishment. First, she argues that the tribe had jurisdiction under 25 U.S.C. § 1911(a), and there was no tribal-state agreement to give the state court jurisdiction to take the termination of her parental rights. Second, she proposes a statutory argument that, even if a tribal-state agreement existed, such an agreement cannot provide a state court's sole basis for jurisdiction over Indian children; in essence she argues that if jurisdiction is exclusive to the tribe under section 1911(a), the tribe cannot share that jurisdiction with the state under section 1919. Third, she argues that the district court's termination proceeding disregarded the ICWA's tribal and parental notice requirements, *see* 25 U.S.C. § 1912, and NRS Chapter 62B's ICWA notice requirements.

A.

Before reaching the merits of Raena's arguments, we must resolve two threshold challenges mounted by the State and the adoptive parents (collectively, the State).

The State's first challenge is jurisdictional. Citing *In re M.M.*, 65 Cal. Rptr. 3d 273, 281 (Ct. App. 2007), in which a California Court of Appeal held that it could not hear the appeal from an order transferring jurisdiction from a state to a tribal court because the transfer divested all California courts of jurisdiction to amend the order, the State maintains that this court lacks subject matter jurisdiction over this appeal.

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[3]She also asserted that her counsel, appointed pursuant to 25 U.S.C. § 1912, was ineffective and that her consent was obtained by fraud, *see* 25 U.S.C. § 1913(d), but she does not advance those arguments here and, therefore, neither do we.

[Headnotes 1-4]

Under the ICWA, state courts are courts of limited jurisdiction. *See State v. Native Village of Tanana*, 249 P.3d 734, 738-39 (Alaska 2011). The State's challenge to our jurisdiction fails, however, because it does not distinguish between jurisdiction to determine jurisdiction, which a court inherently possesses, *see Rosado v. Wyman*, 397 U.S. 397, 403 n.3 (1970) (noting ''the truism that a court always has jurisdiction to determine its own jurisdiction''), and jurisdiction over the subject matter of the controversy, which, when absent, means the court ''cannot decide the case on the merits.'' *In re Orthopedic Products Liab. Litigation*, 132 F.3d 152, 155 (3d Cir. 1997).

The State misinterprets *In re M.M.* to apply to the former while it concerns the latter. The *M.M.* appeals court held that it lacked jurisdiction to determine the merits of the transfer order, not that it lacked jurisdiction to determine whether the California district court had jurisdiction at the outset. 65 Cal. Rptr. 3d at 284. As such, *In re M.M.* is inapposite. *See Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990) (subject matter jurisdiction cannot be waived and may be raised in petition to vacate initial child custody order).

[Headnote 5]

Second, seizing on the children's initial ineligibility for tribal membership, the State asserts that the district court's termination proceeding represented the continuation of the 2005 child welfare dependency proceedings and so was not even subject to the ICWA. This is incorrect. While the children may not have initially qualified for tribal enrollment, it was for the tribe to decide whether the children were enrollable, a question the tribe answered in the affirmative before the termination hearing occurred.[4] *See Matter of Petition of Phillip A. C.*, 122 Nev. 1284, 1291, 149 P.3d 51, 56 (2006) (''Whether a person is a member of a Native American tribe for ICWA purposes is for the tribe itself to answer . . . .''); *In re Dependency of E.S.*, 964 P.2d 404, 410 (Wash. Ct. App. 1998) (noting that a tribe ''may determine at a point in time that a given child is not enrollable and later change its mind and determine that the child is enrollable,'' thus implicating the ICWA even in the middle of proceedings). Therefore, because the children became ''Indian child[ren]'' before the termination occurred, proceedings concerning their custody were and are subject to the

[4]We recognize that Raena ultimately relinquished her parental rights. For consistency, we will refer to the proceedings as termination proceedings. *See In re J.M.*, 218 P.3d 1213, 1216-17 (Mont. 2009) (under the ICWA, relinquishments that began as involuntary termination proceedings but yield a voluntary termination must still comply with the ICWA's involuntary termination procedures).

ICWA. *See* 25 U.S.C. § 1903(4) (defining ''‘Indian child’'' as ''any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe''); *see also id.* § 1903(1)(ii) (''termination of parental rights'' proceedings within the ICWA's purview). Thus, the ICWA applies but, as discussed below, we determine that the district court's exercise of termination jurisdiction was proper under 25 U.S.C. § 1919.

B.

[Headnote 6]

The ICWA was enacted to counteract the large-scale separations of Indian children from their families, tribes, and culture through adoption or foster care placement, generally in non-Indian homes. *See Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30, 32 (1989); *Matter of Petition of Phillip A. C.*, 122 Nev. at 1295, 149 P.3d at 58-59. Surveys conducted in 1969 and 1974 by the Association on American Indian Affairs showed that 25 to 30 percent of Indian children were being separated from their families and that fully 85 to 90 percent of these children were being placed in non-Indian foster care, adoptive homes, or institutions. H.R. Rep. No. 95-1386, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7531. These separations and placements were found to be largely unwarranted, resulting from a failure by child welfare services to understand the cultural differences in Indian child-rearing practices and other social and economic factors of Indian life. *Matter of Adoption of Crews*, 825 P.2d 305, 308-09 (Wash. 1992) (citing H.R. Rep. No. 95-1386, at 10-12, 1978 U.S.C.C.A.N. 7532-35).

The ICWA establishes ''minimum Federal standards for the removal of Indian children from their families.'' 25 U.S.C. § 1902. Section 1911 creates a ''dual jurisdictional scheme'' for Indian child custody proceedings which was rooted in ''pre-ICWA case law in the federal and state courts.'' *Holyfield*, 490 U.S. at 36, 42. Subsection (a) of section 1911 provides, in part, that ''[a]n Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law.''[5] If the child is a ward of the tribe, exclusive jurisdiction re-

[5]The exception in cases ''where such jurisdiction is otherwise vested in the State by existing Federal law,'' 25 U.S.C. § 1911(a), is widely held to be a reference to Public Law 280 states (Minnesota, California, Wisconsin, Alaska, Nebraska, and Oregon), which obtained near-blanket jurisdiction over tribal affairs. Pub. L. No. 280, 67 Stat. 588 (1953) (codified as amended in 18 U.S.C. § 1162 (2006)).

sides with the tribe regardless of the child's residence and domicile. *Id.*

Subsection (b) is a relational provision for ''concurrent but presumptively tribal jurisdiction,'' *see Holyfield*, 490 U.S. at 36; *Cohen's Handbook of Federal Indian Law* 829 (5th ed. 2005), which requires transfer of state court proceedings involving Indian children not ''domiciled or residing within the reservation.'' 25 U.S.C. § 1911(b). This mandatory transfer may be derailed by objection of either parent, declination by the tribe, or good cause. *Id.*

Raena argues that, once the tribe's blood quantum requirements changed, section 1911(a) vested exclusive jurisdiction to determine their custody in the tribe. The children were ''Indian child[ren],'' 25 U.S.C. § 1903(4), and section 1911(a) gave the tribe jurisdiction over them, because the record shows that they were domiciled on the reservation (despite the State's contention that Raena was incarcerated off reservation). *Holyfield*, 490 U.S. at 48 (domicile for children is the domicile of their parents); *McCracken v. Murphy*, 328 F. Supp. 2d 530, 532 (E.D. Pa. 2004) (an inmate's domicile is the domicile before incarceration, unless the inmate intends to live elsewhere when he or she is released). Without more, the tribe would have had exclusive jurisdiction over the termination proceedings pursuant to section 1911(a).

But section 1911 is not the ICWA's only jurisdictional provision. Section 1919(a) authorizes states and tribes to ''enter into agreements . . . respecting . . . jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction.'' The district court's exercise of subject matter jurisdiction over the relinquishment relied on section 1919(a). Thus, it specifically found: ''Tribal Social Services and State Social Services were in agreement that the Termination of Parental Rights should proceed in State District Court and the placement and adoption of the children, if necessary, would proceed in the Tribal Court.''

Here, DCFS, tribal social services, the state court, and the tribal court all agreed that the termination proceeding would conclude in Nevada state court, then be transferred to the tribal court for the adoption. Tribal social services and DCFS collaborated for years to ensure the necessary players stayed informed, and the district court diligently assessed the applicability of the ICWA at each step. When the children became eligible for tribal membership, the district court secured tribal approval before proceeding with the termination. Interim tribal social services director Melanie Arragon notified DCFS that the tribe was ready to move on the termination issue but wanted the state to complete what it had started.

As DCFS summarized: ''A joint decision was made to continue with the Division of Child and Family Services maintaining jurisdiction with the Fallon Paiute Shoshone Tribal Social Services

being a co-agent and lending support''; ''[u]pon a termination of parental rights hearing being set the Fallon Paiute Shoshone Tribal court will schedule a Status hearing to receive an update on what is occurring.'' All along, the tribal court recognized that the children were in concurrent ''legal and physical custody'' of the tribe and state and determined that the ''current plan and placement of [the children] is appropriate and approved to address termination of parental rights . . . .'' After the termination was complete, the tribal court recognized the cessation of concurrent jurisdiction on May 7, 2007, when it ''accept[ed]'' the transfer of jurisdiction and the district court ordered that ''legal and physical custody of [the children] be returned to the Fallon Paiute Shoshone Tribal Social Services.'' The cooperation here and agreement for the state court to exercise termination jurisdiction can hardly be questioned; therefore, we reject Raena's argument that the record does not demonstrate that a section 1919(a) agreement to share jurisdiction was reached. In fact, it demonstrates the opposite, as the district court expressly found.[6]

Also unavailing is Raena's argument that the tribe had exclusive jurisdiction under section 1911(a) over the termination proceedings and could not share ''exclusive jurisdiction'' by a section 1919 agreement. Basically, Raena argues that section 1919 agreements are only available when concurrent state-tribal jurisdiction exists under section 1911(b). Without a state's foundational jurisdiction rooted in section 1911(b), she argues section 1919 cannot apply.

[Headnotes 7, 8]

Raena's reading of the statutory scheme would require an implausible departure from its language. We '' 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.' '' *BedRoc Limited, LLC v. United States*, 541 U.S. 176, 183 (2004) (alteration in original) (quoting *Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 253-54 (1992)). Thus, our inquiry begins with the statutory text and ends there, if the text is unambiguous. *BedRoc Limited*, 541 U.S. at 183. Neither the language of section 1919 nor that of section 1911 supports Raena's interpretation.

The language of section 1919 authorizes jurisdictional agreements for concurrent jurisdiction where it would not otherwise exist:

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[6]While the record does not contain an executed agreement between the tribe and state, Raena points to no authority that such a writing is required. To add such a requirement would complicate section 1919's authorization of transfer and exercise of concurrent jurisdiction by cooperation on a ''case-by-case'' basis. *See Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Fed. Reg. 67,584, 67,585 (Nov. 26, 1979) (declining to set forth guidelines for case-by-case transfer of jurisdiction and jurisdictional agreements because guidelines would ''impose on such agreements restrictions that Congress did not intend should be imposed'').

> States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis *and agreements which provide for concurrent jurisdiction between States and Indian tribes*.

25 U.S.C. § 1919(a) (emphasis added).

[Headnote 9]

As noted above, Raena urges us to interpret section 1919 to apply only to section 1911(b), *see supra* p. 22. Section 1911(b), though, covers scenarios in which states and tribes already have concurrent jurisdiction. *Holyfield*, 490 U.S. at 36. Adopting Raena's interpretation would render meaningless the ''provide for'' language in the last clause of section 1919, which commonly means ''to make available.'' *Webster's New Universal Unabridged Dictionary* 1556 (1996). ''This court generally avoids statutory interpretation that renders language meaningless or superfluous.'' *Karcher Firestopping v. Meadow Valley Contr.*, 125 Nev. 111, 113, 204 P.3d 1262, 1263 (2009); *see Duncan v. Walker*, 533 U.S. 167, 174 (2001) (courts must give effect, if possible, to every clause of a statute).

Section 1911(a)'s reference to the tribe having ''exclusive jurisdiction'' does not persuade us to adopt Raena's view. In permitting concurrent exercise of jurisdiction by agreement on a case-by-case basis, section 1919 represents the more specific of the two statutes. *In re Resort at Summerlin Litigation*, 122 Nev. 177, 185, 127 P.3d 1076, 1081 (2006) (''[W]here a general statutory provision and a specific one cover the same subject matter, the specific provision controls.''). It permits concurrent jurisdiction that otherwise would not exist, *i.e.*, in which exclusive jurisdiction would otherwise exist. Thus, section 1919(a) permits tribes and states the freedom to coordinate jurisdiction consensually where, as here, such coordination is deemed best.[7] It would be improper to ''impose on such agreements restrictions that Congress did not intend should be imposed.'' *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Fed. Reg. 67,584, 67,585 (Nov. 26, 1979) (explain-

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[7]Legislation permitting tribal-state agreements affecting jurisdiction is not unusual. *See* 25 U.S.C. §§ 2701-21 (2006) (Indian Gaming Regulatory Act requires state-tribal agreements); *Cohen's Handbook of Federal Indian Law* 590 (5th ed. 2005) (''Because of federal supremacy over Indian affairs, tribes and states may not make agreements altering the scope of their jurisdiction in Indian country absent congressional consent'' but may alter the scope of their jurisdiction with congressional consent.); *Kennerly v. District Court of Montana*, 400 U.S. 423, 429-30 (1971).

ing the BIA's decision not to provide guidelines to tribal-state agreements under section 1919).

Even assuming, arguendo, that Raena's reading of sections 1911 and 1919 identifies a colorable ambiguity in their text, her analysis still fails. While ''[r]eliance on legislative history in divining the intent of Congress is . . . a step to be taken cautiously,'' *Piper v. Chris-Craft Industries*, 430 U.S. 1, 26 (1977), the ICWA's history confirms our reading of sections 1911(a) and 1919, not Raena's. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59-60 (1978) (employing Indian law canons of construction when statutory language is unclear). The ICWA evinces an inherent mistrust of state child custody adjudications involving Indian children, *Holyfield*, 490 U.S. at 44-45, but Congress was careful not to unduly burden tribal autonomy by substituting its judgment for the tribes', S. Rep. No. 95-597, at 18 (1977) (section 1919 ''give[s] to states and tribes the broadest possible latitude in the types of agreements they may enter into''). Section 1919 preserves inherent tribal sovereignty to determine that state social services and courts—at least on a case-by-case basis—could be helpful. *Cohen's Handbook of Federal Indian Law* 120 (5th ed. 2005) (''[T]ribal . . . sovereignty [is] preserved unless Congress's intent to the contrary is clear and unambiguous''). In this case, where the children initially were not eligible for membership in the tribe then became eligible, self-determination and governance is best recognized by upholding the tribe's agreement to yield to state jurisdiction for the termination proceeding. Here, the tribe determined that Nevada courts were an appropriate forum to exercise jurisdiction over the termination proceedings and under section 1919 that determination was the tribe's to make. We therefore uphold the district court's jurisdiction over Raena's relinquishment of parental rights under 25 U.S.C. § 1919.

C.

[Headnote 10]

Raena next argues that the state court lacked jurisdiction because neither she nor the tribe received proper notice of the termination proceeding. She bases this argument on 25 U.S.C. § 1912,[8] which requires notice ''by registered mail with return receipt requested''

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[8]Though Raena relinquished her rights, the proceeding began as an involuntary termination and section 1912's notice provisions apply to proceedings that begin as involuntary terminations but result in voluntary terminations. *See, e.g.*, *In re J.M.*, 218 P.3d at 1217-18 (holding that a proceeding which began as an involuntary proceeding but resulted in a voluntary termination needed to comply with section 1912 but not section 1913); *In re Welfare of MG*, 201 P.3d 354, 358 (Wash. Ct. App. 2009) (noting that mother's consent to dependency did not change the initial involuntary proceeding to a voluntary one).

to the Indian child's parent and tribe of the ''pending [termination] proceedings and of their right of intervention.''

[Headnotes 11, 12]

This argument fails because both Raena and the tribe had actual notice of the termination proceeding.[9] Raena appeared and participated; the tribe approved of it, agreeing to the state court's exercise of jurisdiction. Though notice may not have been sent ''by registered mail with return receipt requested,'' 25 U.S.C. § 1912(a), and the record does not include the document used to provide Raena's notice, ''[w]hen actual notice of an action has been given, irregularity in the content of the notice or the manner in which it was given does not render the notice inadequate.'' Restatement (Second) of Judgments § 3 (1982); *see Matter of B.J.E.*, 422 N.W.2d 597, 599-600 (S.D. 1988) (actual notice sufficient where there was substantial compliance with the ICWA); *Matter of L.A.M.*, 727 P.2d 1057, 1060-61 (Alaska 1986) (actual notice renders compliance with section 1912's technical ''registered mail with return receipt requested'' requirements unnecessary) (dictum); *In re TM*, 628 N.W.2d 570, 575 (Mich. Ct. App. 2001); *Matter of Welfare of M.S.S.,* 936 P.2d 36 (Wash. Ct. App. 1997); *see also In re D.M.*, 685 N.W.2d 768, 771-72 (S.D. 2004) (holding that continuous contact between state social services and the tribe over seventeen months substantially complied with section 1912's notice of right to intervention requirement).

Accordingly, we affirm.

SAITTA, C.J., and DOUGLAS, CHERRY, GIBBONS, HARDESTY, and PARRAGUIRRE, JJ., concur.

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[9]Raena argues that the court lacked jurisdiction because it did not comply with the notice provisions set forth in NRS 128.023, which in termination proceedings requires the district court to ''[c]ause the Indian child's tribe to be notified in writing in the manner provided in the Indian Child Welfare Act.'' She correctly points out that the record does not contain a writing from the district court to the tribe. However, because Nevada's statutes reinforce the ICWA, under which actual notice to the tribe suffices, the tribe's actual notice from DCFS, rather than the district court, substantially satisfies NRS 128.023. *In re TM*, 628 N.W.2d 570, 575 (Mich. Ct. App. 2001) (technical failure in method of notice ''does not invalidate the proceedings if actual notice was achieved through a comparable method''). Here, there is no indication that NRS 128.023 grants notice rights beyond those delineated by 25 U.S.C. § 1912. *International Game Tech. v. Dist. Ct.*, 122 Nev. 132, 153, 127 P.3d 1088, 1103 (2006) (when the Legislature patterns a statute after a federal statute we presume it intended the same construction and operation).

ROBERT SCOTLUND VAILE, APPELLANT, *v.* CISILIE A. PORSBOLL, FKA CISILIE A. VAILE, RESPONDENT.

No. 53687

CISILIE A. PORSBOLL, FKA CISILIE A. VAILE, APPELLANT, *v.* ROBERT SCOTLUND VAILE, RESPONDENT.

No. 53798

January 26, 2012 268 P.3d 1272

Consolidated appeals from a district court post-divorce decree order imposing statutory penalties on child support arrearages under NRS 125B.095. Eighth Judicial District Court, Family Court Division, Clark County; Cheryl B. Moss, Judge.

Following a divorce, the district court entered an order imposing statutory penalties against father on child support arrearages. Mother and father appealed. On consolidation, the supreme court, HARDESTY, J., held that: (1) the district court lacked subject matter jurisdiction to modify support obligation; and (2) on issue of apparent first impression, setting support obligation at fixed amount constituted modification of support obligation.

Reversed and remanded.

Robert Scotlund Vaile, Kenwood, California, in Proper Person.

Willick Law Group and *Marshal S. Willick*, Las Vegas, for Cisilie A. Porsboll.

Catherine Cortez Masto, Attorney General, and *Donald W. Winne, Jr.*, Deputy Attorney General, Carson City, for Amicus Curiae State of Nevada, Division of Welfare and Supportive Services, Child Support Enforcement Program.

1. CHILD SUPPORT.

   The district court lacked subject matter jurisdiction under the Uniform Interstate Family Support Act to modify its previous child support order in situation in which neither party nor their children resided in the state; even when the issuing state's order had not been modified by another state and the order remained controlling, if the parties and the children did not reside in the issuing state, the issuing state lacked authority to modify the support order. NRS 130.10139, 130.205(1).

2. CHILD SUPPORT.

   Under the Uniform Interstate Family Support Act, a court with personal jurisdiction over the obligor has the authority to establish a child support order and to retain jurisdiction to enforce or modify the order until certain conditions occur that end the issuing state's jurisdiction and confer jurisdiction on another state. NRS 130.10139, 130.205, 130.206.

3. CHILD SUPPORT.
   Setting father's child support payments at sum certain of $1,300 per month constituted a modification of the support obligation contained in divorce decree, rather than merely a clarification of the support obligation, when modification set support obligation at fixed sum, contradicting divorce decree that required the obligation to be redetermined each year based on circumstances of the parties.
4. CHILD SUPPORT.
   In the family law context, a modification of a previous order occurs when the district court's order alters the parties' substantive rights, while a clarification involves the district court defining the rights that have already been awarded to the parties.

Before SAITTA, C.J., HARDESTY and PARRAGUIRRE, JJ.

OPINION

By the Court, HARDESTY, J.:

In these appeals, we address the district court's authority to enforce or modify a child support order that a Nevada district court initially entered, when neither the parties nor the children reside in Nevada. We conclude that, under the Uniform Interstate Family Support Act, because no other jurisdiction has entered an order concerning child support, the Nevada order controls and the district court retains subject matter jurisdiction to enforce the Nevada order, but since the parties and children do not reside in Nevada and the parties have not consented to the district court's exercise of jurisdiction, the district court lacks subject matter jurisdiction to modify the support order. On this latter point, we take this opportunity to explain the distinction between a family court order that modifies a prior order and one that merely clarifies the prior order. Because we conclude that the district court in the present case impermissibly modified the child support obligation set forth in the divorce decree, we reverse the district court's order and remand this matter to the district court for further proceedings.

BACKGROUND

In 1998, Robert Scotlund Vaile and Cisilie A. Porsboll were granted a divorce in a Nevada district court proceeding. The divorce decree adopted and incorporated the terms of the parties' separation agreement with regard to, among other things, the payment of child support. Under the agreement, Vaile was obligated to pay Porsboll monthly child support according to a specific formula that was calculated based on the parties' annual exchange of tax return information or income statements to determine their combined income. Although the parties' compliance with the provision is not entirely clear from the documents before us, the district court

found that the parties never exchanged tax returns or otherwise complied with the requirements of this agreement, but that Vaile nonetheless paid $1,300 a month in child support from August 1998 to April 2000. The district court further found that, thereafter, Vaile ceased voluntarily paying child support.

In November 2007, Porsboll, through counsel, filed in the district court a motion seeking ''to establish a sum certain due each month in child support'' and to ''reduce arrears in child support to judgment.'' Porsboll's motion asked the district court to establish a fixed monthly child support obligation for Vaile based on Nevada's child support statute without regard to the parties' agreed-upon formula adopted in the decree, to calculate arrears, and to reduce those arrears to judgment. In particular, the motion sought to have the support set at the $1,300 amount that Vaile had previously paid. The district court granted Porsboll's motion, set Vaile's monthly child support obligation at $1,300 and used that figure to calculate his support arrearages, which it then reduced to judgment. The district court subsequently imposed penalties on the arrearages amount under NRS 125B.095. When Porsboll filed her motion, neither the parties nor the children resided in Nevada.[1] Both Vaile and Porsboll filed separate appeals challenging the district court's rulings, and the parties' appeals were consolidated for the purpose of this court's appellate review.

In the appeal pending in Docket No. 53687, Vaile, proceeding in proper person, raises various challenges to the district court's child support and penalty determinations, including an assertion that the district court impermissibly modified the support award contained in the divorce decree, as it lacked subject matter jurisdiction to do so.[2] In Docket No. 53798, Porsboll challenges the methodology used by the district court to determine the statutory penalty amount imposed on Vaile under NRS 125B.095 and the ensuing penalties.

DISCUSSION

The primary issue presented in these appeals is whether the district court had subject matter jurisdiction to enforce or modify its child support order when the parties and their children do not reside in Nevada. Nevada's version of the Uniform Interstate Family Support Act (UIFSA), NRS Chapter 130, controls our resolution

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[1]Based on the parties' filings in this court, Vaile currently resides in California, and Porsboll and the children live in Norway.

[2]We reject Vaile's attempt to resurrect challenges to Nevada's personal jurisdiction over the parties, which were previously determined in *Vaile v. District Court*, 118 Nev. 262, 268-77, 44 P.3d 506, 511-16 (2002). Moreover, the Nevada district court retains continuing personal jurisdiction over the parties under NRS 130.202.

of this issue. After concluding that the district court had subject matter jurisdiction to enforce the Nevada child support order, we then consider whether the district court's determination that Vaile owes $1,300 per month in child support constitutes a modification or a clarification of the initial support obligation.

Subject matter jurisdiction

[Headnotes 1, 2]

Enacted in all 50 states, the UIFSA creates a single-order system for child support orders, which is designed so that only one state's support order is effective at any given time. Unif. Interstate Family Support Act prefatory note (2001), 9/IB U.L.A. 163 (2005); *see also Lunceford v. Lunceford*, 204 S.W.3d 699, 702 (Mo. Ct. App. 2006). To facilitate this single-order system, UIFSA provides a procedure for identifying the sole viable order, referred to as the controlling order, required for UIFSA to function. *See* NRS 130.207 (addressing the recognition and determination of the controlling child support order); Unif. Interstate Family Support Act § 207 cmt. (2001), 9/IB U.L.A. 198-99 (2005). Under UIFSA's statutory scheme, a court with personal jurisdiction over the obligor has the authority to establish a child support order and to retain jurisdiction to enforce or modify the order until certain conditions occur that end the issuing state's jurisdiction and confer jurisdiction on another state.[3] *Jurado v. Brashear*, 782 So. 2d 575, 579 (La. 2001); *see also Upson v. Wallace*, 3 A.3d 1148, 1156 (D.C. 2010) (''Although the UIFSA never speaks explicitly of 'subject matter jurisdiction,' the terms that it does use—'jurisdiction' and 'continuing exclusive jurisdiction'—are simply alternative ways of referring to subject matter jurisdiction . . . .'').

One such condition that calls the issuing state's jurisdiction into question occurs when the parties and the children for whose benefit the support order has been entered do not reside in the issuing state when a motion concerning child support is filed. *See* NRS 130.205(1)(a). Under these circumstances, the fact that the parties and the children do not reside in the issuing state does not divest the issuing state of jurisdiction to enforce its support order when that order is the controlling order and has not been modified by another state in accordance with UIFSA. *See* NRS 130.206 (discussing continuing jurisdiction to enforce a child support order); *Sidell v. Sidell*, 18 A.3d 499, 510-11 (R.I. 2011); *Nordstrom v. Nordstrom*, 649 S.E.2d 200, 204 (Va. Ct. App. 2007); Unif. Interstate Family Support Act § 206 cmt. (2001), 9 U.L.A. 196 (2005) (noting that ''the validity and enforceability of the controlling order continues unabated until it is fully complied with, unless

[3]NRS 130.10139 defines ''issuing state'' as a ''state in which a tribunal issues a support order . . . .''

it is replaced by a modified order issued in accordance with [UIFSA],'' and that ''even if the individual parties and the child no longer reside in the issuing State, the controlling order remains in effect and may be enforced by the issuing State or any responding State . . . .''). But even when the issuing state's order has not been modified by another state and the order remains controlling, if the parties and the children do not reside in the issuing state, the issuing state lacks authority to modify the support order. *See* NRS 130.205(1)(a); *Dept. of Economic Sec. v. Tazioli*, 246 P.3d 944, 946 (Ariz. Ct. App. 2011); *Brown v. Hines-Williams*, 2 A.3d 1077, 1081 (D.C. 2010); *McLean v. Kohnle*, 940 So. 2d 975, 978-79 (Miss. Ct. App. 2006); *Lilly v. Lilly*, 250 P.3d 994, 998-1003 (Utah Ct. App. 2011); *Nordstrom*, 649 S.E.2d at 202-05; *but see* NRS 130.205(1)(b) (providing that the parties may consent to the issuing state exercising subject matter jurisdiction to modify a child support order).

Here, there is only one child support order, the order issued by the Nevada district court as part of the divorce decree.[4] Thus, the Nevada order controls. NRS 130.207(1) (providing that, ''[i]f a proceeding is brought under this chapter and only one tribunal has issued a child-support order, the order of that tribunal controls and must be so recognized''). Moreover, it is undisputed that neither the parties nor their children resided in Nevada when Porsboll filed her child support motion, and no party asserts that he or she consented to the Nevada court's continued exercise of jurisdiction. As a result, the Nevada district court lacked subject matter jurisdiction to modify the support obligation contained in the divorce decree. NRS 130.205(1). Thus, we must determine whether the district court impermissibly modified the child support obligation under UIFSA when it imposed a sum certain payment of $1,300 per month as Vaile's child support obligation, or if that determination was a clarification of the child support order for the purpose of enforcement.

Modification versus clarification

[Headnote 3]

On appeal, Vaile contends that setting his support payments at the sum certain of $1,300 per month constitutes a modification of the support obligation contained in the divorce decree. Porsboll disagrees, asserting that the district court merely clarified, rather

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[4]Although the parties' appellate filings and various parts of the appellate record allude to a possible child support order entered by a Norway court, no such order is contained in the appellate record, nor does it appear that the district court was provided with any such order. Consequently, on remand, the district court must determine whether such an order exists and assess its bearing, if any, on the district court's enforcement of the Nevada support order.

than modified, the support obligation. The district court's order shows that the court initially concluded, without explanation, that setting the $1,300 support payment was a clarification. In a subsequent order, however, the district court stated that ''the convoluted portions of the [divorce decree had been] vacated and modified . . . to reflect $1,300.00 per month as a 'sum certain.' ''[5] In that same order, the district court later returned to describing its setting of the $1,300 payment as having ''clarified the child support order.'' This court has not addressed the distinction between a modification and a clarification of a prior district court order in the family law context.

[Headnote 4]

Other courts that have addressed the issue look to whether the challenged order changes the parties' rights under the earlier order or merely defines the parties' existing rights. In *Collins v. Billow*, 592 S.E.2d 843, 844-45 (Ga. 2004), the Georgia Supreme Court addressed whether the establishment of a sum certain payment amount of $140 per week constituted a modification of a divorce decree provision that required the wife to pay the husband child support in the amount of 23 percent of her annual income or $115 per week. The court concluded that the establishment of the $140 per week payment constituted a modification because, if the sum certain amount had been based on a calculation of 23 percent of the wife's current income in accordance with the decree, that would have resulted in a weekly payment of $158.[6] *Id.* at 845; *see also In Re Marriage of Jarvis*, 792 P.2d 1259, 1261-62 (Wash. Ct. App. 1990) (addressing whether a trial court had modified or clarified a provision providing for child support while one of the children was enrolled as a full-time student in college and applying the rule that a divorce decree is modified when parties' rights are extended or reduced beyond those set forth in the decree, while a clarification involves the definition of rights previously awarded). Also useful to our consideration is a North Dakota Supreme Court case, *Stoelting v. Stoelting*, 412 N.W.2d 861, 862-63 (N.D. 1987), that addressed the propriety of a trial court's al-

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[5]The phrase ''sum certain'' in this context comes from NRS 125B.070(1)(b) (defining ''obligation for support'' as ''the sum certain dollar amount determined according to'' a schedule provided in that statute).

[6]*But see Paschal v. Paschal*, 117 S.W.3d 650, 652 (Ark. Ct. App. 2003) (concluding, in a case where a sum certain payment amount was required by administrative order but the divorce decree did not provide such a figure, that a subsequent order establishing sum certain child support payments using Arkansas's child support charts was a clarification rather than a modification because an order that ''fails to recite the amount of support . . . has no sum certain . . . capable of modification,'' but nonetheless noting that the decree was ''unambiguous in that the parties intended to set child support in accordance with the child-support chart'').

teration of a divorce decree, which changed the nature of certain payments made by one party from payments for the purpose of property settlement to alimony and separate maintenance payments. In rejecting an argument that this action was not a modification, but instead constituted a mere clarification of the decree, the *Stoelting* court noted that the distinction between a modification and a clarification is that a clarification provides definition to the parties' obligations, but leaves the parties' substantive rights unchanged. *Id.* at 863; *see also Boucher v. Boucher*, 191 N.W.2d 85, 89 (Mich. Ct. App. 1971) (noting that the distinction between a modification and a clarification in the context of a divorce decree turns on whether changes are made to the parties' substantive rights); *Ulrich v. Ulrich*, 400 N.W.2d 213, 218 (Minn. Ct. App. 1987) (recognizing that, in the property-division context, a trial court has the authority to clarify and construe a divorce decree so long as the parties' substantive rights are not altered). We find these decisions instructive, and therefore conclude that in the family law context a modification occurs when the district court's order alters the parties' substantive rights, while a clarification involves the district court defining the rights that have already been awarded to the parties. *Compare* NRS 125A.115 (providing in the child-custody-jurisdiction-and-enforcement context that ''modification'' ''means a child custody determination that changes, replaces, supersedes or is otherwise made after a previous determination concerning the same child . . . .'').

Applying this approach to the district court's order in this case establishing the $1,300 per month sum certain support obligation, we conclude that this determination constituted a modification of the support obligation. Pursuant to the parties' separation agreement, which was adopted and incorporated into the divorce decree, the monthly support payment was to be redetermined each year and the parties were required to exchange tax return information or a certified statement of their income, which would then be used to determine the monthly child support obligation using the agreed-upon formula.[7] Thus, under the decree's terms it was possible for Vaile's monthly support obligation to change from year to year. By setting Vaile's monthly support payment at the fixed amount of $1,300 per month, the district court substantively altered the par-

[7]Because the parties' agreement was merged into the divorce decree, to the extent that the district court purported to apply contract principles, specifically, rescission, reformation, and partial performance based on Vaile's initial payments of $1,300 and Porsboll's acceptance of these payments to support its decision to set the payments at $1,300, any application of contract principles to resolve the issue of Vaile's support payments was improper. *See Day v. Day*, 80 Nev. 386, 389-90, 395 P.2d 321, 322-23 (1964) (concluding that when a support agreement is merged into a divorce decree, the agreement loses its character as an independent agreement, unless both the agreement and the decree direct the agreement's survival).

ties' rights, such that the district court modified, rather than clarified, the support obligation contained in the divorce decree and thereby exceeded its jurisdiction in violation of NRS 130.205(1).[8]

Because we conclude that the district court's establishment of a $1,300 per month sum certain for Vaile's child support obligation constituted an impermissible modification of the original support obligation, we reverse the district court's order setting Vaile's support payment at $1,300, and we further reverse the arrearages calculated using the $1,300 support obligation and the penalties imposed on those arrearages. We remand the matter to the district court for further proceedings consistent with this opinion.[9]

SAITTA, C.J., and PARRAGUIRRE, J., concur.

IN THE MATTER OF THE ESTATE OF WILLIAM MELTON, DECEASED.

THE STATE OF NEVADA; LINDA MELTON ORTE; AND SHERRY L. MELTON BRINER, APPELLANTS, *v.* VICKI PALM; ELIZABETH STESSEL; ROBERT MELTON; BRYAN MELTON; AND JOHN CAHILL, PUBLIC ADMINISTRATOR, RESPONDENTS.

No. 55634

February 16, 2012 272 P.3d 668

Appeal from a district court order in a probate action. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

County public administrator initiated a special administration of testator's estate. Testator's daughter, testator's half-sisters, and State joined the proceeding as parties. The district court distributed the estate to testator's daughter. Testator's half-sisters and State appealed. The supreme court held that: (1) letter handwritten by testator was a valid holographic will; (2) as a matter of first impres-

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[8]Given that the district court lacked subject matter jurisdiction to modify the support obligation, the assertion that the district court's establishment of a ''sum certain'' figure for Vaile's support payments was made to comply with the 2001 amendment to NRS 125B.070(1)(b) is unavailing.

[9]With regard to Vaile's remaining challenges to the district court's decision, to the extent they are not explicitly addressed herein, we have considered Vaile's arguments and conclude that they lack merit. Additionally, in light of our resolution of this matter, we do not reach Porsboll's challenge, in Docket No. 53798, to the methodology employed by the district court to calculate Vaile's statutory penalties and the ensuing penalties.

sion, statute abolished the common law disinheritance rules; (3) disinheritance clause in testator's holographic will was enforceable; (4) the doctrine of dependent relative revocation would be adopted; but (5) the doctrine of dependent relative revocation did not undo holographic will's revocation of testator's prior will; and (6) the proper distribution of testator's estate under his holographic will was an escheat.

Reversed.

Catherine Cortez Masto, Attorney General, and *K. Kevin Benson*, Deputy Attorney General, Carson City, for Appellant the State of Nevada.

Kehoe & Associates and *Ty E. Kehoe*, Henderson, for Appellants Linda Melton Orte and Sherry L. Melton Briner.

Albright Stoddard Warnick & Albright and *Whitney B. Warnick*, Las Vegas, for Respondents Vicki Palm and Elizabeth Stessel.

Bowler Smith & Twitchell LLP and *Russell K. Bowler* and *Jonathan W. Barlow*, Las Vegas, for Respondent John Cahill.

Solomon Dwiggins & Freer and *Mark A. Solomon*, Las Vegas, for Respondents Robert Melton and Bryan Melton.

1. WILLS.
   Whether a handwritten document is a valid will is a question of law reviewed de novo.
2. APPEAL AND ERROR.
   Questions of statutory construction, including the meaning and scope of a statute, are questions of law, reviewed de novo.
3. WILLS.
   The interpretation of a will is typically subject to plenary review.
4. WILLS.
   Whether a will has been revoked is generally a question of law reviewed de novo.
5. STATUTES.
   When a statute is clear and unambiguous, the supreme court gives effect to the plain and ordinary meaning of the words and does not resort to the rules of construction.
6. STATUTES.
   The supreme court must give a statute's terms their plain meaning, considering its provisions as a whole so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory.
7. WILLS.
   Letter written by testator and mailed to a friend, stating that he did not want his brother, his daughter, or any of his other relatives to receive

one penny of his estate, was a valid holographic will, though it was discovered among miscellaneous papers in testator's home, where the letter was written, signed, and dated by testator. NRS 133.090.

8. DESCENT AND DISTRIBUTION.
Statute that includes testamentary instruments that merely limit an individual or class from inheriting in the definition of ''will'' abolishes the common law disinheritance rules, which otherwise would render a testator's disinheritance clause unenforceable when the testator is unsuccessful at affirmatively devising his or her estate. NRS 132.370.

9. DESCENT AND DISTRIBUTION.
Clause in testator's holographic will, disinheriting all of testator's relatives including his daughter, was enforceable, though the devise of testator's entire estate to a friend lapsed because the friend predeceased testator and thus testator was unsuccessful at affirmatively devising his estate, as the common law disinheritance rules were abolished by statute. NRS 132.370.

10. WILLS.
Revocation of a former will is presumed when a second will is executed. NRS 133.120(1).

11. WILLS.
A will may be impliedly revoked by a subsequent will. NRS 133.120(1).

12. WILLS.
Under the doctrine of revocation by implication, a will may be impliedly revoked by the execution of a later will containing inconsistent or repugnant provisions, although such later will contains no express clause of revocation.

13. WILLS.
Revocation of a will by implication is not favored; nonetheless, a revocation must be implied when there is such a plain inconsistency as makes it impossible for the wills to stand together, and a later will that affects the same property as an earlier will or disposes of the entire estate, leaving nothing on which the former will can operate, is generally regarded as a revocation thereof, even in the absence of express words of revocation. NRS 133.120(1).

14. WILLS.
Earlier will of testator, which devised most of his estate to his parents and smaller portions to relatives and a friend was revoked by implication by testator's subsequent holographic will, when the holographic will devised his entire estate to the friend, both wills attempted to affect the same property, and no property was left upon which the earlier will could operate. NRS 133.120(1).

15. WILLS.
Adopting Restatement (Third) of Property section on the ''doctrine of dependent relative revocation,'' which operates to undo an otherwise sufficient revocation of a will when there is evidence that the testator's revocation was conditional rather than absolute. NRS 133.130; Restatement (Third) of Property: Wills and Other Donative Transfers § 4.3.

16. WILLS.
The doctrine of dependent relative revocation can only apply when there is a clear intent of the testator that the revocation of the old will is made conditional on the validity of the new will. Restatement (Third) of Property: Wills and Other Donative Transfers § 4.3.

17. WILLS.
Under the doctrine of dependent relative revocation, evidence of the intent of a testator to make revocation of on old will contingent on the validity of the new will cannot be left to speculation, supposition, conjecture or possibility. Restatement (Third) of Property: Wills and Other Donative Transfers § 4.3.

18. WILLS.
When there is a substantial disparity in the terms of the two instruments that reflects the testator's disfavor of the original will, it cannot intelligently be concluded under the doctrine of dependent relative revocation that the testator would have preferred for the original will to control the distribution of his or her estate in the event that the subsequent will proves ineffective. Restatement (Third) of Property: Wills and Other Donative Transfers § 4.3.

19. WILLS.
The doctrine of dependent relative revocation is applied with caution, and while it may be widely recognized, it is narrowly applied.

20. WILLS.
Adoption of the doctrine of dependent relative revocation was not precluded by the anti-revival statute, as the anti-revival statute restricted the fundamentally distinct doctrine of revival. NRS 133.130; Restatement (Third) of Property: Wills and Other Donative Transfers § 4.3.

21. WILLS.
The doctrine of ineffective revocation is to be distinguished from revival of a formerly revoked will; under the revival doctrine, an effectively revoked will is rendered valid and effective because it has been reinstated by subsequent conduct showing an intent to revive it, not because the revocation was ineffective. Restatement (Third) of Property: Wills and Other Donative Transfers § 4.3.

22. WILLS.
The doctrine of dependent relative revocation did not undo the revocation of testator's earlier will by his subsequent holographic will, as the objective of the holographic will did not fail; though the holographic will did not operate to transfer testator's estate given that the friend to whom the holographic will devised testator's entire estate predeceased testator, the disinheritance clause in the holographic will was enforceable independent of the lapsed devise to the friend, and there was no clear evidence that the disinheritance clause was conditioned upon the friend receiving the estate. Restatement (Third) of Property: Wills and Other Donative Transfers § 4.3.

23. DESCENT AND DISTRIBUTION; ESCHEAT; WILLS.
The proper distribution of testator's estate under his holographic will was an escheat when the clause in the will disinheriting all of testator's heirs was enforceable and the friend to whom the will devised all of testator's estate predeceased testator. NRS 132.195, 132.370, 134.120.

24. DESCENT AND DISTRIBUTION.
When a disinheritance clause is enforceable as to intestate property, a disinherited heir is treated, as a matter of law, to have predeceased the testator. NRS 134.120.

25. DESCENT AND DISTRIBUTION; ESCHEAT.
When a testator disinherits all heirs, he or she leaves no surviving spouse or kindred for the purposes of escheat of an intestate estate statute, and, as a consequence, an escheat is triggered. NRS 134.120.

26. DESCENT AND DISTRIBUTION; ESCHEAT.

The law disfavors escheats, but it also strives to effectuate the intentions of testators, and when a testator disinherits all of his or her heirs, the law's disfavor of escheats does not prevent an estate from passing to the State. NRS 132.370, 134.120.

Before SAITTA, C.J., DOUGLAS, CHERRY, GIBBONS, PICKERING, HARDESTY and PARRAGUIRRE, JJ.

OPINION

Per Curiam:

This is a dispute between the State and a testator's daughter and half sisters over his $3 million estate. At issue is the proper distribution of the estate of the testator, who, by way of a handwritten will, attempted to disinherit all of his heirs but was unsuccessful in otherwise affirmatively devising his estate. Under the common law, a disinheritance clause was unenforceable in these circumstances. In the proceedings below, after determining that the testator's handwritten will was a valid testamentary instrument that revoked his earlier will, the district court applied the prevailing common law rule, and thereby deemed the testator's disinheritance clause unenforceable. The court therefore distributed the testator's entire estate to his disinherited daughter, pursuant to the law of intestate succession, and rejected the claim that because he disinherited all of his heirs, his estate must escheat to the State to be used for educational purposes.

Crucially, however, the Nevada Legislature has enacted a statute providing, in pertinent part, that a will includes ''a testamentary instrument that merely . . . excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession.'' NRS 132.370. We conclude that by its plain and unambiguous language, NRS 132.370 abolishes the common law rules that would otherwise render a testator's disinheritance clause unenforceable when the testator is unsuccessful at affirmatively devising his or her estate. Here, although the district court correctly determined that the testator executed a valid handwritten will that revoked his earlier will, the court erred in deeming the disinheritance clause contained therein unenforceable.

Next, we consider whether to adopt the doctrine of dependent relative revocation, which, broadly stated, provides that a revocation made in connection with a failed dispositive objective or false assumption of law or fact should be considered ineffective when doing so is necessary to ensure that an estate is distributed in a manner that most closely matches the testator's probable intent. In this, we consider whether the district court erred in determining that the doctrine is precluded by NRS 133.130, which provides, in

relevant part, that where a testator executes two wills, the revocation of the second will does not operate to ''revive the first will,'' absent terms in the revocation expressing an intention to revive the first will or the reexecution of the first will. We conclude that NRS 133.130 restricts revival, a concept that is fundamentally distinct from the doctrine of dependent relative revocation. Furthermore, because we believe that the general policy underlying the doctrine of dependent relative revocation is sound, we take this opportunity to expressly adopt the doctrine. Here, while the district court erred in determining that NRS 133.130 precludes the doctrine of dependent relative revocation, it did not err in alternatively determining that if the doctrine exists in Nevada, it is inapplicable under the particular facts of this case.

Finally, we consider whether an escheat is triggered when, as here, a testator disinherits all of his or her heirs. We conclude that an escheat is triggered in such a circumstance because, when all heirs have been disinherited, the testator ''leaves no surviving spouse or kindred'' under NRS 134.120 pursuant to the plain and commonly understood meaning of that phrase. Accordingly, the district court erred in determining that the testator's estate does not escheat.

Because the disinheritance clause contained in the testator's will is enforceable, we reverse the judgment of the district court. As the testator disinherited all of his heirs, his estate must escheat.

FACTS AND PROCEDURAL HISTORY

The 1975 will

In 1975, William Melton executed a formal will. The will was comprised of two forms, which Melton and three witnesses signed. Melton devised most of his estate to his parents and devised small portions to his brother and two of his cousins, Terry Melton and Jerry Melton. He also indicated that his daughter was to receive nothing. In 1979, Melton executed a handwritten codicil on the back of one of the 1975 will forms that provided his friend, Alberta (Susie) Kelleher, should receive a small portion of his estate (both will forms and the codicil are hereinafter referred to as ''the 1975 will'').

The 1995 letter

In 1995, Melton sent a handwritten letter to Kelleher. It reads:

> 5-15-95
>
> 5:00 AM
>
> Dear Susie
>
> I am on the way home from Mom's funeral. Mom died from an auto accident so I thought I had better leave something in writing so that you Alberta Kelleher will receive my

> *entire estate*. I *do not* want my brother Larry J. Melton or Vicki Palm or any of my other relatives to have *one penny* of my estate. I plan on making a revocable trust at a later date. I think it is the 15 of [M]ay, no calendar, I think it[']s 5:00 AM could be 7:AM in the City of Clinton Oklahoma
>
> Lots of Love
>
> Bill
>
> /s/ William E. Melton
> AKA Bill Melton
> [Social security number]

Discovery of the 1975 will and the 1995 letter

Kelleher died in 2002, thus predeceasing Melton, who died in 2008.[1] Shortly after Melton's death, respondent John Cahill, Clark County Public Administrator,[2] initiated a special administration of Melton's estate. During this administration, it was discovered that Melton had a daughter, respondent Vicki Palm. The 1995 letter was also discovered. Initially, Palm and respondent Elizabeth Stessel[3] were appointed co-administrators of Melton's estate. But the district court suspended their powers after determining that a disinterested party should administer the estate because a dispute over the proper distribution of the estate had arisen between Melton's half sisters, appellants Linda Melton Orte and Sherry L. Melton Briner, appellant State of Nevada, respondents Bryan Melton and Robert Melton,[4] and Palm. The district court therefore appointed Cahill to be the special administrator of Melton's estate. Thereafter, Cahill obtained access to Melton's safe deposit box and discovered the 1975 will. The appraised net value of Melton's estate is approximately $3 million.

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[1]As evinced by Melton's references to his mother's funeral in the 1995 letter, his mother died sometime in 1995. It is not clear from the record when Melton's father died, but the parties agree that he predeceased Melton.

[2]Cahill is listed as a party in this appeal, but he has submitted a short brief explaining that he has no interest in this appeal.

[3]Because Palm is not a Nevada resident, she associated with Stessel, who is a Nevada resident, to co-administer the estate. *See* NRS 139.010(4)(a) (explaining that a nonresident cannot administer an estate unless he or she associates with a resident). Stessel is listed as a party in this appeal, but she has not submitted a brief and does not appear to have an interest in this appeal.

[4]Bryan is the son of Terry Melton and Robert is the son of Jerry Melton. During the proceedings below, Bryan and Robert asserted that they had an interest in the estate because Terry and Jerry were named as devisees under the 1975 will and were Melton's cousins. Bryan and Robert are listed as parties in this appeal, but they have not submitted briefs and do not appear to have an interest in this appeal.

The parties and their respective positions

Melton's daughter

Palm, Melton's only known child, initially argued that the 1995 letter is not a valid will, and that Melton's estate therefore should pass to her under the statutes governing intestate succession. Following the discovery of the 1975 will, however, she argued that the 1995 letter is a valid will and that it revoked the 1975 will. Palm argued that although the 1995 letter is a valid will, it is ineffective because the only named devisee, Kelleher, predeceased Melton. Thus, she maintained that Melton's estate should pass through intestacy, under which she has priority pursuant to NRS 134.100.[5]

Melton's half sisters

In the proceedings below, Melton's half sisters contended that the 1995 letter is not a valid will, and therefore, the 1975 will is still effective. In addition, they argued that if the 1995 letter is a valid will, it does not effectively revoke the 1975 will. They further argued that, even assuming that the 1995 letter is a valid will that revoked the 1975 will, the revocation should be disregarded under the doctrine of dependent relative revocation. Although Melton's half sisters were not named as devisees in the 1975 will, they asserted that under Nevada's antilapse statute, NRS 133.200,[6] they could take their parent's share of Melton's estate.

The State

The State asserted that the 1995 letter is a valid will that revoked the 1975 will. It argued that the Legislature's revisions to the Nevada Probate Code in 1999 provide for the enforcement of disinheritance clauses, even when an estate passes by intestate succession. Thus, the State contended that because Melton expressly disinherited all of his relatives in the 1995 letter, his estate must escheat.

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[5]NRS 134.100 provides, in pertinent part: ''If the decedent leaves no surviving spouse, but there is a child . . . the estate goes to the child . . . .''

[6]The version of NRS 133.200 in effect when Melton died provided:

> When any estate is devised to any child or other relation of the testator, and the devisee dies before the testator, leaving lineal descendants, those descendants, in the absence of a provision in the will to the contrary, take the estate so given by the will in the same manner as the devisee would have done if the devisee had survived the testator.

We note that the Legislature amended NRS 133.200 in 2011. 2011 Nev. Stat., ch. 270, § 71, at 1435. However, these amendments do not affect our analysis in this matter.

The district court order

After extensive briefing by the parties, the district court determined as follows: (1) the 1995 letter is a valid will; (2) although the 1995 letter is a valid will, the disinheritance clause contained therein is unenforceable; (3) the 1995 letter revoked the 1975 will; (4) the revocation of the 1975 will cannot be disregarded under the doctrine of dependent relative revocation because NRS 133.130 precludes the doctrine in Nevada; and (5) even if the doctrine of dependent relative revocation applies in Nevada, the doctrine is not applicable under the particular facts presented in this case. Accordingly, the district court distributed Melton's estate to Palm pursuant to the intestate succession scheme. Melton's half sisters and the State each appealed.

DISCUSSION

On appeal, the parties largely maintain the positions that they asserted during the proceedings below. Thus, in their appeal, Melton's half sisters' primary contention is that the district court erred in determining that the 1975 will does not control the distribution of Melton's estate. In its appeal, the State's main contention is that the district court erred in deeming Melton's disinheritance clause unenforceable and in determining that his estate does not escheat.

The parties' positions compel us to resolve a sequence of issues. First, we must consider whether the 1995 letter is a valid will, and if so, whether the disinheritance clause contained therein is enforceable. We conclude that the 1995 letter is a valid will and that the disinheritance clause contained therein is enforceable under NRS 132.370. Next, we address whether the 1995 letter revoked the 1975 will. Answering this question in the affirmative, we next consider whether to adopt the doctrine of dependent relative revocation in Nevada and whether the doctrine can be applied to render the revocation of the 1975 will ineffective. Because the doctrine of dependent relative revocation promotes the sound policy of effectuating a testator's intent as closely as possible, we take this opportunity to expressly adopt the doctrine. We conclude, however, that the doctrine cannot be applied under the particular facts of this case. Finally, we turn to the proper distribution of Melton's estate under the terms of the 1995 letter. We conclude that because Melton disinherited all of his heirs, his estate must escheat to the State pursuant to NRS 134.120. Accordingly, we reverse the judgment of the district court.

Standard of review

[Headnotes 1-4]

Whether a handwritten document is a valid will is a question of law reviewed de novo. *Randall v. Salvation Army*, 100 Nev. 466,

470, 686 P.2d 241, 243 (1984). Similarly, ''questions of statutory construction, including the meaning and scope of a statute, are questions of law, which [we] review[ ] de novo.'' *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003). Further, the interpretation of a will is typically subject to our plenary review. *Matter of Estate of Meredith*, 105 Nev. 689, 691, 782 P.2d 1313, 1315 (1989). Lastly, whether a will has been revoked is also generally a question of law reviewed de novo. *Estate of Anderson*, 65 Cal. Rptr. 2d 307, 311 (Ct. App. 1997).

[Headnotes 5, 6]

''When a statute is clear and unambiguous, we give effect to the plain and ordinary meaning of the words and do not resort to the rules of construction.'' *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010). As we have explained, we ''must give [a statute's] terms their plain meaning, considering its provisions as a whole so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory.'' *Southern Nev. Homebuilders v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (internal quotation omitted). We also have explained that a statute's express definitions are controlling because ''[t]o read [them] otherwise would lead to the absurd result of rendering [such provisions] . . . mere surplusage.'' *Boulder Oaks Cmty. Ass'n v. B & J Andrews*, 125 Nev. 397, 406, 215 P.3d 27, 32-33 (2009).

The 1995 letter is a valid will

Melton's half sisters assert that the 1995 letter is simply a letter and nothing more. They emphasize that the 1995 letter was discovered amongst miscellaneous papers in Melton's home, in contrast to the 1975 will, which was found carefully placed in a safe. Thus, Melton's half sisters argue that if Melton intended for the 1995 letter to be his will, he would have treated it as carefully as the 1975 will. Therefore, they contend that because the 1995 letter is not a valid will, the 1975 will still controls the distribution of Melton's estate.

[Headnote 7]

Nevada law gives holographic wills the same effect as formally executed wills. NRS 133.090(3). ''A holographic will is a will in which the signature, date and material provisions are written by the hand of the testator, whether or not it is witnessed or notarized.'' NRS 133.090(1).

The 1995 letter was written, signed, and dated by Melton. It contains the material provisions of a will because it provided that Kelleher should receive Melton's estate and that his relatives should receive nothing. Although Melton did not store the 1995 letter in the same manner that he stored the 1975 will, its valid-

ity as a holographic will does not depend upon him doing so. Melton's testamentary intent is evinced by his references to his mother's funeral, her untimely death, and his statement that he ''had better leave something in writing.'' Accordingly, we conclude that the 1995 letter is a valid holographic will.

The disinheritance clause contained in the 1995 letter is enforceable

Having concluded that the 1995 letter is a valid holographic will, we now consider the State's contention that the district court erred in applying the prevailing common law rule regarding disinheritance clauses and thereby deeming the disinheritance clause unenforceable. We begin our analysis of this contention by providing a background on the common law disinheritance rules, the criticisms thereof, and the modern treatment of disinheritance provisions. Next, we consider the parties' specific arguments regarding whether NRS 132.370 reverses the common law disinheritance rules in Nevada.

Background on disinheritance clauses

Under the common law, two general rules, known as the ''English rule'' and the ''American rule,'' have been developed by courts considering whether to enforce disinheritance provisions as to property passing by intestate succession. *See* J. Andrew Heaton, Comment, *The Intestate Claims of Heirs Excluded by Will: Should ''Negative Wills'' Be Enforced?*, 52 U. Chi. L. Rev. 177, 179-83 (1985). Under the English rule, a disinheritance provision, or a so-called ''negative will'' was enforceable only if ''the testator clearly expressed an intent to limit an heir to the devise (if any) contained in the will, and at least one other heir remained eligible to receive the intestate property.'' *Id.* at 180. Under the American rule, a testator could ''prevent an heir from receiving his share of any property that passes by intestacy only by affirmatively disposing of the entire estate through a will.'' *Id.*

As its name suggests, the majority of jurisdictions subscribe to the American rule. *See, e.g.*, *In re Barnes' Estate*, 407 P.2d 656, 659 (Cal. 1965) (''It is settled that a disinheritance clause, no matter how broadly or strongly phrased, operates only to prevent a claimant from taking under the will itself, or to obviate a claim of pretermission. Such a clause does not and cannot operate to prevent the heirs at law from taking under the statutory rules of inheritance when the decedent has died intestate as to any or all of his property.''); 4 William J. Bowe and Douglas H. Parker, *Page on the Law of Wills* § 30.17, at 148 (rev. ed. 2004) (''If testator

does not dispose of the whole of his estate by his last will and testament, and such will contains negative words of exclusion, the great majority of states hold that such negative words cannot prevent property from passing under the statutes of descent and distribution.'').

Courts following the American rule have espoused three rationales for doing so: (1) enforcing disinheritance provisions as to intestate property ''would create an undesirable 'mixing' of the probate and intestacy systems by requiring courts to alter the distribution scheme provided in the intestacy statute''; (2) because disinheritance clauses do not expressly name devisees, ''their enforcement would in effect require courts to draft new wills for testators''; and (3) disinheritance clauses are simply ''inconsistent with the law of succession.'' Heaton, *supra*, at 186.

The common law disinheritance rules, and the rationales underpinning them, have been the subjects of intense criticism. *See, e.g.*, Frederic S. Schwartz, *Models of the Will and Negative Disinheritance*, 48 Mercer L. Rev. 1137, 1140, 1167 (1997) (stating that the justifications given for the common law rules are ''obviously circular'' and unsatisfactory, and urging courts ''to give straightforward effect'' to disinheritance provisions); Heaton, *supra*, at 184, 186 (noting that none of the rationales for the American rule ''withstand[ ] analysis,'' and concluding that it defeats testators' intentions).

Not surprisingly, because the common law disinheritance rules distort testamentary intent and conflict with testamentary freedom, the modern trend is to reject the traditional rules. The Uniform Probate Code (UPC) reflects this trend, providing that ''[a] decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession.'' Unif. Probate Code § 2-101(b), 8/I U.L.A. 79 (1998). The drafters of the UPC stated that in enacting this provision, they abrogated ''the usually accepted common-law rule, which defeats a testator's intent for no sufficient reason.'' *Id.* § 2-101 cmt. The Restatement (Third) of Property also rejects the common law disinheritance rules, providing that ''[a] decedent's will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession.'' Restatement (Third) of Prop.: Wills and Other Donative Transfers § 2.7 (1999). As with the UPC, the Restatement explains that this provision ''reverses the common-law rule, which defeats a testator's intent for no sufficient reason.'' *Id.* § 2.7 cmt. a. With the foregoing in mind, we turn to whether the Legislature intended for NRS 132.370 to abolish the common law disinheritance rules.

NRS 132.370 abolishes the common law disinheritance rules

[Headnote 8]

The State asserts that by revising the Nevada Probate Code in 1999 to provide that a ''will'' includes a ''testamentary instrument that merely . . . . excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession,'' the Legislature has rejected both the English and American rules. Thus, the State argues that disinheritance provisions are now enforceable as to property passing by intestate succession. The State acknowledges that Nevada has not adopted the UPC, but it points out the similarity in the language of NRS 132.370 and UPC section 2-101.

Palm contends that the ''definition sections of Nevada's Probate Code should not be given substantive effect''[7] and claims that giving effect to disinheritance provisions would make estate planning unpredictable. In essence, she believes that the language that the Legislature used in NRS 132.370 was imprecise and unwise. Thus, Palm asserts that we should apply the common law disinheritance rules, which would render Melton's disinheritance clause unenforceable. Palm argues that because Melton's disinheritance clause is unenforceable, the district court correctly determined that she should receive Melton's estate, as she has priority under the intestate succession scheme.

NRS 132.370 defines ''will'' as follows:

> ''Will'' means a formal document that provides for the distribution of the property of a decedent upon the death of the decedent. The term includes a codicil and a testamentary instrument that *merely* appoints an executor, revokes or revises another will, nominates a guardian, *or expressly excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession*.

(Emphases added.)

The interpretation of NRS 132.370 is a matter of first impression for this court. NRS 132.370 defines a ''will'' broadly. In stark contrast to the common law disinheritance rules, NRS 132.370 imposes no requirement that an instrument affirmatively devise property in order to be enforceable. Rather, a will includes

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[7]Palm cites *In re McKay's Estate*, 43 Nev. 114, 184 P. 305 (1919), for this proposition. *McKay's Estate* is an unremarkable case that merely indicated that a general definition could not be ''carried into'' a specific provision relating to rights of representation; it did not hold that definitions are not to be given effect. *Id*. at 127, 184 P. at 308-09. Moreover, even if *McKay's Estate* were to stand for the proposition that Palm attaches to it, such a proposition does not comport with this court's more recent caselaw discouraging statutory interpretation that renders terms nugatory. *See Southern Nev. Homebuilders v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005).

an instrument that ''merely'' limits an individual or class from inheriting. The plain language of NRS 132.370 thus demonstrates that the Legislature envisioned a probate system in which disinheritance provisions can be enforced as to intestate property.[8] Though Palm considers NRS 132.370 unwise, under well-established canons of statutory interpretation, we must not render it nugatory or a mere surplusage. *See Boulder Oaks Cmty. Ass'n v. B & J Andrews*, 125 Nev. 397, 406, 215 P.3d 27, 32-33 (2009); *Southern Nev. Homebuilders v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005).

The significance of NRS 132.370 cannot be overstated. While the Legislature's amendments to the probate code in 1999 are not a wholesale adoption of the UPC, the language of NRS 132.370 mirrors that of UPC section 2-101, which, as previously noted, was designed to abrogate the common law disinheritance rules. Giving effect to disinheritance provisions, however, is not so radical that it creates the estate planning upheaval that Palm claims it would. As UPC states such as Arizona, Colorado, and North Dakota demonstrate, such provisions can be seamlessly incorporated into the existing probate system. *See, e.g.*, *Matter of Estate of Krokowsky*, 896 P.2d 247, 249 n.2 (Ariz. 1995); *In re Estate of Walter*, 97 P.3d 188, 192 (Colo. Ct. App. 2003); *In re Estate of Samuelson*, 757 N.W.2d 44, 47 (N.D. 2008).[9]

In addition, we find the approach taken by New York courts instructive. New York, like Nevada, has not adopted the UPC, but it has enacted a statute defining a ''will,'' in relevant part, as ''an oral declaration or written instrument . . . whereby a person disposes of property or directs how it shall not be disposed of . . . .'' N.Y. Est. Powers & Trusts Law § 1-2.19(a) (McKinney 1998).

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[8]Because NRS 132.370 is unambiguous, resort to the legislative history behind its enactment is unnecessary. It should be noted, however, that the Legislature identified ''eliminating unnecessary technicalities that defeat the intentions of the person making a will'' as a ''main element[ ]'' of its revisions to the probate code. A.B. 400, Bill Summary, 70th Leg. (Nev. 1999).

[9]Palm recognizes these decisions, but asks that we instead follow *Matter of Estate of Jetter*, where, in a 3-2 decision, the Supreme Court of South Dakota decided that a disinheritance clause executed under circumstances similar to this case was unenforceable, despite South Dakota's adoption of the UPC. 570 N.W.2d 26, 30 (S.D. 1997). The *Jetter* majority's decision has been criticized as unsound and unpersuasive; we agree with these assessments and therefore decline to follow *Jetter*. *See* Julia M. Melius, Note, *Was South Dakota Deprived of $3.2 Million? Intestacy, Escheat, and the Statutory Power to Disinherit in the Estate of Jetter*, 44 S.D. L. Rev. 49, 75, 78, 82 (1999) (meticulously analyzing *Jetter* and concluding that it ''directly contradicts the plain language of the [South Dakota disinheritance] statute and constitutes judicial legislation, . . . is hostile to the doctrine of testamentary freedom,'' ''disregarded sound precedent,'' and is ''a result-oriented decision to prevent an escheat''); *see also* Restatement (Third) of Prop.: Wills and Other Donative Transfers § 2.7 reporter's note 2 (1999) (stating that the result in *Jetter* is ''[u]nfortunate[ ]'').

New York courts have interpreted this definition to be a reversal of the common law disinheritance rules:

> Prior to September 1, 1967, the effective date of [the statute defining ''will''], the cases held that: ''The legal rights of the heir or distributee to the property of deceased persons, cannot be defeated except by a valid devise or bequest of such property to other persons'' . . . .
>
> However, in this Court's opinion the new statute is unmistakable in providing that a testator now may disinherit an heir from all his property, both testamentary and intestate assets.

In re Will of Beu, 333 N.Y.S.2d 858, 859 (Surr. Ct. 1972) (citation omitted) (quoting *In re Hefner's Will*, 122 N.Y.S.2d 252, 254 (Surr. Ct. 1953)), *aff'd*, 354 N.Y.S.2d 600 (App. Div. 1974); *see also Matter of Will of Stoffel*, 427 N.Y.S.2d 720, 721 (Surr. Ct. 1980) (''The definition of 'will' changed the rule previously existing which made directions to disinherit someone ineffective unless all of the Decedent's assets were effectively disposed to others.''), *aff'd*, 437 N.Y.S.2d 922 (App. Div. 1980). In short, we conclude that in enacting NRS 132.370, the Nevada Legislature, like the New York Legislature, abolished the common law disinheritance rules.

[Headnote 9]

Here, Melton drafted a will in which he expressly excluded all of his heirs: ''I *do not* want my brother Larry J. Melton or Vicki Palm or any of my other relatives to have *one penny* of my estate.'' Melton's intent to disinherit his heirs could not have been clearer. *See Matter of Estate of Meredith*, 105 Nev. 689, 691, 782 P.2d 1313, 1315 (1989) (''[T]he surest way . . . to carry out a testator's intent is to construe a will according to the plain meaning of the terms used in the will.''). Although Palm speculates that Melton only intended to exclude her if his estate passed through his will, he placed no qualifications on his disinheritance clause. Without such direction from Melton, it cannot be said that he meant to disinherit Palm if his estate passed through his will but that he would have been content to have her receive his estate if it passed through intestate succession. *See Estate of Samuelson*, 757 N.W.2d at 48 (''[W]hen a testator expressly excludes an individual in his will, the individual is excluded from taking under both testate and intestate succession, unless the testator expressly specifies a contrary intention.''). Pursuant to NRS 132.370, simply because Kelleher predeceased Melton, thereby causing his devise to her to lapse, does not render the remainder of the will, including its disinheri-

tance clause, unenforceable. Accordingly, we conclude that the disinheritance clause contained in the 1995 letter is enforceable.

The 1995 letter revoked the 1975 will by implication

Melton's half sisters contend that even if the 1995 letter is a valid and enforceable will, it did not revoke the 1975 will. Specifically, they assert that the 1995 letter did not expressly revoke the 1975 will or otherwise effectuate a revocation in the manner required by NRS 133.120(1).

[Headnotes 10, 11]

NRS 133.120(1)(b) provides that a written will may be revoked by ''[a]nother will or codicil in writing, executed as prescribed in this chapter.'' This court has made clear that ''[r]evocation of a former will is presumed where a second will is executed.'' *Shephard v. Gebo*, 77 Nev. 226, 231, 361 P.2d 537, 540 (1961). In other words, a will may be impliedly revoked by a subsequent will.

[Headnotes 12, 13]

Under the doctrine of revocation by implication, ''[a] will may be impliedly revoked by the execution of a later will containing inconsistent or repugnant provisions, although such later will contains no express clause of revocation.'' 95 C.J.S. *Wills* § 422 (2011) (footnotes omitted). Revocation by implication is not favored. *In re Arnold's Estate*, 60 Nev. 376, 380, 110 P.2d 204, 206 (1941); 95 C.J.S. *Wills* § 422 (2011). Nonetheless, a revocation must be implied when ''there is such a plain inconsistency as makes it impossible for the wills to stand together.'' 95 C.J.S. *Wills* § 422 (2011). Thus, ''a later will which affects the same property as an earlier will or disposes of the entire estate, leaving nothing on which the former will can operate, is generally regarded as a revocation thereof, even in the absence of express words of revocation.'' *Id.* (footnotes omitted).

[Headnote 14]

In the 1975 will, Melton devised most of his estate to his parents and devised small portions to his brother, other relatives, and Kelleher. In the 1995 letter, Melton devised his entire estate to Kelleher. Thus, both instruments attempted to affect the same property. Because Melton attempted to devise all of his estate in the 1995 letter, no property was left upon which the 1975 will could operate. Consequently, the provisions of the two wills are so inconsistent that they cannot stand together. We therefore conclude that the 1995 letter revoked the 1975 will by implication, unless the doctrine of dependent relative revocation applies to undo this revocation, which we consider next.

The doctrine of dependent relative revocation applies in Nevada but does not apply under the particular facts of this case

Melton's half sisters contend that the district court erred in determining that the doctrine of dependent relative revocation does not apply under Nevada law. In particular, they argue that the court erred in determining that NRS 133.130 precludes the doctrine. Melton's half sisters further argue that the doctrine should be applied here because if Melton had known that his devise to Kelleher would lapse, it stands to reason that he would have preferred the 1975 will to control the distribution of his estate.

[Headnotes 15-19]

Dependent relative revocation is ''[a] common-law doctrine that operates to undo an otherwise sufficient revocation of a will when there is evidence that the testator's revocation was conditional rather than absolute.'' *Black's Law Dictionary* 503 (9th ed. 2009). Although this court has, in passing, acknowledged the doctrine of dependent relative revocation, *Shephard*, 77 Nev. at 232, 361 P.2d at 540, it has never expressly adopted the doctrine.

The Restatement (Third) of Property distills the doctrine's general application as follows:

> (a) A partial or complete revocation of a will is presumptively ineffective if the testator made the revocation:
>
> (1) in connection with an attempt to achieve a dispositive objective that fails under applicable law, or
>
> (2) because of a false assumption of law, or because of a false belief about an objective fact, that is either recited in the revoking instrument or established by clear and convincing evidence.
>
> (b) The presumption established in subsection (a) is rebutted if allowing the revocation to remain in effect would be more consistent with the testator's probable intention.

Restatement (Third) of Prop.: Wills and Other Donative Transfers § 4.3 (1999).

Consistent with its purpose, ''[t]he doctrine can only apply where there is a clear intent of the testator that the revocation of the old will is made conditional on the validity of the new one.'' 95 C.J.S. *Wills* § 412 (2011). ''Evidence of this intent cannot be left to speculation, supposition, conjecture or possibility.'' *Matter of Estate of Patten*, 587 P.2d 1307, 1309 (Mont. 1978). Another noteworthy limitation on the doctrine is that it generally cannot be applied unless the two instruments reflect a very similar dispositive scheme. *See, e.g.*, *Kroll v. Nehmer*, 705 A.2d 716, 722-23 (Md. 1998) (''[C]ourts have generally refused to apply the doctrine unless the two instruments reflect a common dispositive scheme.''); *Hauck v. Seright*, 964 P.2d 749, 754 (Mont. 1998) (''For the doc-

trine to apply, the new will must not have changed the testamentary purpose of the old will and must essentially repeat the same dispositive plans.''). The reason for this rule is simple: A substantial disparity in the terms of the two instruments reflects the testator's disfavor of the original will, and thus, in such a case, it cannot intelligently be concluded that the testator would have preferred for the original will to control the distribution of his or her estate in the event that the subsequent will proves ineffective. *See Kroll*, 705 A.2d at 723. In sum, ''[t]he doctrine is applied with caution,'' and ''while [it] may be widely recognized, it is narrowly applied.'' *Patten*, 587 P.2d at 1309.

As indicated above, when responsibly applied, the doctrine promotes the general policy of giving effect to a testator's intent. *See* 79 Am. Jur. 2d *Wills* § 529 (2002). Jurisdictions that have adopted the doctrine recognize that it ''is simply one means of implementing [the] paramount rule'' of enforcing a testator's intent as nearly as possible. *Estate of Anderson*, 65 Cal. Rptr. 2d 307, 313 (Ct. App. 1997). This policy is sound and coincides with the longstanding objective of this court to give effect to a testator's intentions to the greatest extent possible. *See Zirovcic v. Kordic*, 101 Nev. 740, 741, 709 P.2d 1022, 1023 (1985) (''[I]t is the long-accepted position of this court that the 'primary aim in construing the terms of a testamentary document must be to give effect, to the extent consistent with law and policy, to the intentions of the testator.' '' (quoting *Concannon v. Winship*, 94 Nev. 432, 434, 581 P.2d 11, 13 (1978))). We therefore expressly adopt the doctrine of dependent relative revocation.

[Headnote 20]

In so doing, we reject the notion that NRS 133.130 precludes the doctrine under Nevada law.

NRS 133.130 provides:

> If, after the making of any will, the testator executes a second will, the destruction, cancellation or revocation of the second will does not *revive* the first will, unless it appears by the terms of the revocation that it was the intention to revive and give effect to the first will, or unless, after the destruction, cancellation or revocation, the first will is reexecuted.

(Emphasis added.)

[Headnote 21]

As we have explained, the effect of NRS 133.130 is that ''[o]nce a will or gift therein is revoked it cannot be revived except by republication or re-execution.'' *Shephard*, 77 Nev. at 231, 361 P.2d at 540. Indeed, by its plain language, NRS 133.130 restricts revival. The statute does not, however, constrain the circumstances in which a revocation may be deemed ineffective. This is a crucial

distinction because a vital precept of the doctrine of dependent relative revocation is that it does not revive a revoked will; rather, it renders a revocation ineffective. Restatement (Third) of Prop.: Wills and Other Donative Transfers § 4.3 cmt. a (1999). As the Restatement explains:

> The doctrine of ineffective revocation[10] is to be distinguished from revival of a formerly revoked will . . . . Under the revival doctrine, an effectively revoked will is rendered valid and effective because it has been reinstated by subsequent conduct showing an intent to revive it, not because the revocation was ineffective.

Id.

Therefore, because anti-revival statutes restrict the fundamentally distinct doctrine of revival, they should not be interpreted to preclude the doctrine of dependent relative revocation. *See In re Nutting's Estate*, 82 F. Supp. 689, 691 (D.D.C. 1949) (explaining that a statute relating to revival ''has no bearing'' on the issue of whether dependent relative revocation applies); *Larrick v. Larrick*, 607 S.W.2d 92, 96 (Ark. Ct. App. 1980) (Newbern, J., concurring) (explaining that an anti-revival statute does not preclude the doctrine of dependent relative revocation because ''the [anti-revival] statute only comes into effect if there has been a 'revocation' [and] [i]t is to determine precisely that question, *i.e.*, whether there has been a revocation, that the doctrine is applied''); *see also* Restatement (Third) of Prop.: Wills and Other Donative Transfers § 4.3 reporter's note 1 (1999) (criticizing courts that have interpreted anti-revival statutes as precluding the doctrine of dependent relative revocation). We therefore conclude that NRS 133.130 does not preclude the doctrine of dependent relative revocation.

[Headnote 22]

Nonetheless, the doctrine does not apply under the facts of this case. This is evident because the objective of the 1995 letter did not fail. The disinheritance clause contained therein is enforceable and applies to Melton's half sisters independent of the lapsed devise to Kelleher. Moreover, there is no clear evidence that the disinheritance clause was conditioned upon Kelleher receiving the estate. Thus, there is no basis for the contention that Melton would not want the 1975 will to be revoked had he known that Kelleher would predecease him. And, even if it could be said that the objective of the 1995 letter failed, the provisions of the 1975 will and the 1995 letter are completely different, which rebuts any claim

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[10]Because the doctrine of dependent relative revocation renders a revocation presumptively ineffective in certain circumstances, the Restatement refers to the doctrine as ''the *doctrine of ineffective revocation*.'' Restatement (Third) of Prop.: Wills and Other Donative Transfers § 4.3 cmt. a (1999).

that Melton would have wished for the revocation of the 1975 will to be disregarded. *See Kroll*, 705 A.2d at 723 (declining to apply the doctrine where a comparison of the two wills revealed ''two very different dispositive schemes,'' and ''[t]he effect of applying the doctrine and disregarding [the testator's] revocation . . . is precisely to do what she clearly did not want done—to leave her estate to people she had intended to disinherit''). Accordingly, we conclude that the doctrine of dependent relative revocation does not apply under the particular facts of this case.

The proper distribution of Melton's estate under the 1995 letter is an escheat

[Headnote 23]

We now turn to the proper distribution of Melton's estate under the terms of the 1995 letter. The State argues that because Melton disinherited all of his heirs in the 1995 letter, an escheat is triggered.

Palm asserts that the requisites of an escheat have not been met because, under NRS 134.120, an intestate estate can escheat only when ''the decedent leaves no surviving spouse or kindred.'' Thus, she contends that because she survived Melton in the literal sense, his estate cannot escheat. Palm also argues that the law abhors escheats, and therefore, as a matter of public policy, an escheat should not be permitted.

Although the 1995 letter contains a disinheritance clause, and is therefore an enforceable testamentary instrument under NRS 132.370, Melton's estate nonetheless must descend through intestacy because he was unsuccessful at affirmatively distributing his estate. *See* NRS 132.195 (an '' '[i]ntestate estate' includes an estate where no will has been offered or admitted to probate as the last will and testament and an estate where the will does not distribute the entire estate'').[11] While this causes a ''mixing'' of the testate and intestate systems that was discouraged under the common law, the Legislature expressly contemplated this result. *See*

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[11]Palm contends that resorting to NRS 132.195 creates a contradiction with NRS 132.190, which provides that '' '[i]ntestate,' used as a noun, means a decedent who dies without leaving a will.'' Thus, she asserts that even if the 1995 letter is an enforceable will, then Melton did not die ''intestate'' under NRS 132.190, and therefore, his estate falls outside of the intestate succession scheme. In other words, Palm argues that if Melton's disinheritance clause is enforceable, his estate falls into a void where no direction as to the distribution of his estate can be gleaned from his will or from a statutory source and, in essence, Melton's will has to be drafted for him, which, of course, courts are loath to do. Palm's argument creates unnecessary confusion. Because the specific definition of ''intestate estate'' in NRS 132.195 matches the precise situation presented here, it controls. *See Lader v. Warden*, 121 Nev. 682, 687, 120 P.3d 1164, 1167 (2005) (''[W]hen a specific statute is in conflict with a general one, the specific statute will take precedence.'').

NRS 132.370 (a ''will'' includes an instrument that excludes an heir from receiving property ''passing by intestate succession'').

[Headnote 24]

Next, NRS 134.120, the provision that sets forth the requisites for the escheat of an intestate estate, provides: ''If the decedent leaves no surviving spouse or kindred, the estate escheats to the State for educational purposes.'' We reject Palm's cramped interpretation of this provision because it is commonly understood that when a disinheritance clause is enforceable as to intestate property, a disinherited heir is treated, as a matter of law, to have predeceased the testator. *See In re Will of Beu*, 333 N.Y.S.2d 858, 861 (Surr. Ct. 1972) (a disinherited heir is ''considered to have predeceased the testator'' under the New York statute providing for the enforcement of disinheritance clauses as to intestate property); Frederic S. Schwartz, *Models of the Will and Negative Disinheritance*, 48 Mercer L. Rev. 1137, 1145 (1997) (''A provision disinheriting [an heir] should result in an application of the intestacy statute as if [that heir] predeceased the testator.''); J. Andrew Heaton, Comment, *The Intestate Claims of Heirs Excluded by Will: Should ''Negative Wills'' Be Enforced?*, 52 U. Chi. L. Rev. 177, 192 (1985) (when a disinheritance clause is enforced as to intestate property ''the excluded heir is treated as having predeceased the testator'').[12]

[Headnote 25]

Thus, because we presume that the Legislature was aware of the commonly understood effect of the language of NRS 134.120 when it drafted the statute, this is how it must be construed. *See Beazer Homes Nevada, Inc. v. Dist. Ct.*, 120 Nev. 575, 580-81, 97 P.3d 1132, 1135-36 (2004) (''When a legislature adopts language that has a particular meaning or history, rules of statutory construction . . . indicate that a court may presume that the legislature intended the language to have meaning consistent with previous interpretations of the language.''). Accordingly, we conclude that when a testator disinherits all heirs, he or she ''leaves no surviving spouse or kindred'' for the purposes of NRS 134.120 and, as a consequence, an escheat is triggered.

[Headnote 26]

The law disfavors escheats. *In re Estate of Cruz*, 264 Cal. Rptr. 492, 493 (Ct. App. 1989). The commonly cited reason for this

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[12]Moreover, if Palm's interpretation of NRS 134.120 were credited, a testator's disinheritance of all heirs would always amount to a useless gesture, despite the Legislature's clearly expressed intent in NRS 132.370 to provide for the enforcement of disinheritance provisions. *See Universal Electric v. Labor Comm'r*, 109 Nev. 127, 131, 847 P.2d 1372, 1374 (1993) (''[T]he intent of a statute will prevail over the literal sense of its words.'').

principle is that ''society prefers to keep real property within the family as most broadly defined, or within the hands of those whom the deceased has designated.'' *United States v. 198.73 Acres of Land, More or Less*, 800 F.2d 434, 435 (4th Cir. 1986). But the law also strives to effectuate the intentions of testators. *Zirovcic v. Kordic*, 101 Nev. 740, 741, 709 P.2d 1022, 1023 (1985). It is unmistakable that in enacting NRS 132.370, the Legislature weighed these competing considerations and determined that testamentary freedom has primacy over the policy disfavoring escheats. Thus, when, as here, a testator disinherits all of his or her heirs, the law's disfavor of escheats does not prevent an estate from passing to the State. Accordingly, we conclude that Melton's estate must escheat to the State.

CONCLUSION

Because the disinheritance clause contained in Melton's will is enforceable, we reverse the judgment of the district court. As Melton disinherited all of his heirs, his estate escheats.[13]

JOHN CARSTARPHEN, APPELLANT, *v.* RICHARD L. MILSNER, AS A SHAREHOLDER AND TREASURER OF AMERICAN MEDFLIGHT, INC., RESPONDENT.

No. 51631

March 1, 2012 270 P.3d 1251

Appeal from a district court order dismissing a corporations action. Second Judicial District Court, Washoe County, Brent T. Adams, Judge.

Defendant moved to dismiss plaintiff's action after plaintiff failed to bring the action to trial within five years. The district court granted motion. Plaintiff appealed. The supreme court, CHERRY, J., held that: (1) district court abused its discretion in denying plaintiff's motion for a preferential trial date; and (2) plaintiff had three years from the date the remittitur was filed in the district court to bring case to trial, overruling *Rickard v. Montgomery Ward & Co.*, 120 Nev. 493, 96 P.3d 743 (2004), and abrogating *Johann v. Aladdin Hotel Corp.*, 97 Nev. 80, 624 P.2d 493 (1981).

Reversed and remanded.

PICKERING, J., dissented.

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[13]We have considered the parties' remaining arguments and conclude that they are without merit.

King & Russo, Ltd., and *J. Scott Russo* and *Patrick O. King*, Minden, for Appellant.

Richard G. Hill, Chartered, and *Richard G. Hill* and *LaRee L. Beck*, Reno, for Respondent.

1. TRIAL.
   The district court abused its discretion in denying plaintiff's motion for a preferential trial date to avoid the expiration of five-year period to bring case to trial; plaintiff filed his preferential trial motion more than three months before the five-year period was set to expire, plaintiff diligently moved his case forward and actively pursued discovery, and the case was never allowed to languish through prolonged periods of inactivity. NRCP 41(e).
2. TRIAL.
   In evaluating a motion for a preferential trial date to avoid the expiration of five-year period to bring case to trial, the district court must consider: (1) the time remaining in the five-year period when the motion is filed, and (2) the diligence of the moving party and his or her counsel in prosecuting the case. NRCP 41(e).
3. APPEAL AND ERROR.
   In case in which the five-year period in which to bring case to trial had expired at the time plaintiff's complaint was erroneously dismissed due to the district court's abuse of discretion in denying plaintiff's motion for a preferential trial date, plaintiff had three years from the date the remittitur was filed in the district court to bring case to trial, overruling *Rickard v. Montgomery Ward & Co.*, 120 Nev. 493, 96 P.3d 743 (2004), and abrogating *Johann v. Aladdin Hotel Corp.*, 97 Nev. 80, 624 P.2d 493 (1981). NRCP 41(e).
4. APPEAL AND ERROR.
   On remand from an erroneous judgment or dismissal entered before trial has commenced that is reversed on appeal, the parties have three years from the date that the remittitur is filed in the district court to bring the case to trial in the first instance, overruling *Rickard v. Montgomery Ward & Co.*, 120 Nev. 493, 96 P.3d 743 (2004), and abrogating *Johann v. Aladdin Hotel Corp.*, 97 Nev. 80, 624 P.2d 493 (1981). NRCP 41(e).

Before the Court EN BANC.

OPINION

By the Court, CHERRY, J.:

In this appeal, we address the factors that the district court must consider when determining whether to grant or deny a motion for a preferential trial date to avoid the expiration of NRCP 41(e)'s five-year period. We conclude that, in accordance with our decision in *Monroe, Ltd. v. Central Telephone Co.*, 91 Nev. 450, 456, 538 P.2d 152, 156 (1975), when evaluating such a motion, the district court must consider the time remaining in the five-year period when the motion is filed and the diligence of the moving party and his or her counsel in prosecuting the case. Here, appel-

lant brought his motion for a preferential trial date with more than three months remaining in the five-year period and demonstrated sufficient diligence in prosecuting his case so that it was an abuse of discretion for the district court to deny the motion. Accordingly, we reverse the interlocutory order denying the preferential trial date motion, and, as a result, we further reverse the subsequent order dismissing the complaint under NRCP 41(e). Since the five-year period had expired at the time the complaint was dismissed on that basis, however, we must determine how much time appellant should have, on remand, to bring his case to trial. As this court's body of jurisprudence contains competing lines of precedent with regard to the time a plaintiff has to bring a case to trial, after the reversal and remand of an erroneous judgment or dismissal entered before the commencement of trial, in order to avoid dismissal under NRCP 41(e), we take this opportunity to clarify our precedent addressing this issue and hold that a plaintiff has three years from the date the remittitur is filed in the district court to bring his or her case to trial.

BACKGROUND

NRCP 41(e)'s five-year rule provides that a district court shall dismiss an action not brought to trial within five years of the date on which the plaintiff filed the action, unless the parties stipulate, in writing, that the time for bringing the action to trial may be extended. Here, on August 13, 2007, with less than seven months left in the five-year period, the parties held a status conference during which they stipulated to vacate an October 15, 2007, trial date and stay all discovery and motion practice until further stipulation of the parties or order of the court, in anticipation of settlement negotiations. In accordance with the stipulation, the October trial date was vacated and trial of the matter was reset for May 12, 2008, beyond the expiration date of the five-year period. The district court subsequently entered a written order memorializing the parties' stipulation and the new trial date. No mention of the running of the NRCP 41(e) period was made either at the status conference or in the district court's order.

Appellant, the plaintiff below, was subsequently unable to obtain an agreement to extend the five-year period up to the scheduled trial date. As a result, the district court was ultimately presented with competing motions by appellant that sought to either confirm that the parties' stipulation at the status conference and the order entered thereon acted to toll or extend the five-year period or obtain a preferential trial date before the expiration of the NRCP 41(e) period. Respondent opposed both motions. The district court denied the preferential trial motion, without explanation, and instead granted the motion to confirm that the five-year rule had

been tolled or extended. In granting the motion, the district court concluded that ''[d]efendants, by stipulating to vacate the October trial date and agreeing to set trial in May 2008, implicitly agreed to extend the five-year rule of NRCP 41(e).''

Despite the grant of appellant's motion to confirm the extension of the five-year rule, on March 5, 2008, shortly after the five-year anniversary of the filing of appellant's complaint, respondent moved the district court to dismiss the action based on appellant's failure to bring the case to trial within five years. Respondent argued that the district court had improperly concluded that an implicit agreement to extend the five-year rule existed. Because the parties' stipulation to reschedule the trial date, as reflected in the transcript of the status conference, made no mention of the five-year period, respondent asserted that no stipulation to extend the period had been made, and thus, the district court was required to dismiss the case pursuant to NRCP 41(e). After full briefing of respondent's motion, the district court entered an order granting the motion and dismissing the underlying case. Finding that the stipulation was in fact silent on the five-year period, the district court concluded that the stipulation was insufficient to toll or extend the running of that period. It further found that ''its order [confirming the extension of the five-year period] was ineffective, as it was based upon an error of law.'' This appeal followed.

On appeal, appellant primarily argues that the district court's denial of his motion for a preferential trial date was improper, and as a result, the dismissal of his case under the five-year rule should be reversed. Respondent disagrees. Based on the reasoning set forth below, we agree with appellant's contention and therefore reverse the denial of the preferential trial date motion and the resulting dismissal of the case under NRCP 41(e), and we remand the matter to the district court for further proceedings consistent with this opinion.

DISCUSSION

In dismissing the underlying action based on appellant's failure to bring the case to trial within the five-year period, the district court concluded that its order confirming the extension of the NRCP 41(e) period was ''ineffective'' and ''based upon an error of law.'' We agree with the district court's conclusion. Indeed, the district court's finding of an implied agreement to toll or extend the NRCP 41(e) period ignored both the plain language of the rule and this court's long-standing authority. *See* NRCP 41(e) (requiring dismissal for failure to bring a matter to trial within five years of filing the complaint ''except where the parties have stipulated in writing that the time may be extended''); *see also Prostack v. Lowden*, 96 Nev. 230, 231, 606 P.2d 1099, 1099-1100 (1980) (recog-

nizing that ''an oral stipulation, entered into in open court, approved by the judge, and spread upon the minutes, is the equivalent of a written stipulation,'' but declining to find any agreement to extend the five-year period where the stipulation ''was silent as to the expiration of the five year limit, and the judge who heard the motion was not made aware of the problem''); *Flintkote Co. v. Interstate Equip. Corp.*, 93 Nev. 597, 571 P.2d 815 (1977) (rejecting an argument that the parties' stipulation contained an implied waiver of the five-year rule and noting that NRCP 41(e) requires any such stipulation to be in writing); *Thran v. District Court*, 79 Nev. 176, 181, 380 P.2d 297, 300 (1963) (concluding that ''[w]ords and conduct, short of a written stipulation'' cannot estop a defendant from seeking dismissal pursuant to the five-year rule). Regardless of whether the infirmity of the implied waiver conclusion was brought to the district court's attention in the course of its consideration of the motion to confirm the extension or that the five-year period had been tolled, the district court should have been aware that no implied waiver could be found and rejected the motion accordingly.

[Headnotes 1, 2]

Further compounding its error in granting the motion to confirm the extension of the NRCP 41(e) period, the district court summarily denied appellant's preferential trial motion, ostensibly based on its conclusion that the parties had stipulated to extend the five-year period.[1] In reaching this conclusion, the district court failed to weigh the relevant considerations set forth in *Monroe, Ltd. v. Central Telephone Co.*, 91 Nev. 450, 456, 538 P.2d 152, 156 (1975), for evaluating a motion for a preferential trial date brought to avoid dismissal under NRCP 41(e)'s five-year rule, and thus, we conclude that the denial of appellant's motion was an abuse of discretion. *Monroe*, 91 Nev. at 456, 538 P.2d at 156 (''Setting trial dates and other matters done in the arrangement of a trial court's calendar is within the discretion of that court, and in the absence of arbitrary conduct will not be interfered with by this court.'').

In *Monroe*, this court rejected appellant's argument that the district court improperly denied a motion for a preferential trial setting brought to avoid the running of the NRCP 41(e) period. *Id.* There, the plaintiff brought the preferential trial date motion less than three weeks before the five-year period expired and, with the exception of the dismissal of one defendant based on a settlement

[1]The district court's order denying the preferential trial motion provides no explanation for its denial. That motion and the motion to confirm the extension of the five-year period were essentially brought as alternatives, however, with appellant asserting that the preferential trial motion could be denied if the district court concluded that the five-year period had been extended and both motions were resolved by orders entered on the same day.

shortly after the complaint was filed, nothing took place in the district court until a ''note for trial docket'' was filed by the plaintiff four years and eleven months after the date the complaint was filed. *Id.* at 452, 538 P.2d at 153. In concluding that no abuse of discretion occurred in denying the preferential trial motion, the *Monroe* court emphasized the fact that appellant had delayed filing its application until ''just before dismissal would have been required under NRCP 41(e).'' *Id.* at 456, 538 P.2d at 156. The court further held that the diligence required on the part of appellant and its counsel was not reflected in the record, noting that ''[n]o valid reason or explanation was given for the pendency of this case for some four years after it had been at issue.'' *Id.* Albeit obscured by the extreme situation at issue in that case, the *Monroe* court nonetheless announced the salient considerations that a district court must weigh when entertaining a motion for a preferential trial date brought to avoid an NRCP 41(e) dismissal.[2] We reaffirm *Monroe*'s determination that, in evaluating such a motion, the district court must consider: (1) the time remaining in the five-year period when the motion is filed, and (2) the diligence of the moving party and his or her counsel in prosecuting the case. 91 Nev. at 456, 538 P.2d at 156.

Applying the factors to the present case, the record reveals that appellant filed his preferential trial motion on November 26, 2007, more than three months before the five-year period was set to expire on March 3, 2008. In addition, the record reflects that appellant diligently moved his case forward and actively pursued discovery. Indeed, on April 4, 2006, with the case more than three years into the five-year period, respondent actually stipulated to the fact that the parties were diligently working on discovery as part of a stipulation between the parties to vacate a trial date. Finally, the record reveals that the underlying case was never allowed to languish through prolonged periods of inactivity.

[Headnotes 3, 4]

In light of the foregoing, we conclude the district court abused its discretion in denying appellant's motion for a preferential trial date. *Id.* As a result, both the district court's denial of that motion

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[2]Focusing on an overly narrow reading of our application of *Monroe* to the facts of the instant case, instead of the actual considerations set forth in that decision, our dissenting colleague incorrectly asserts that we adopt a new rule governing the resolution of preferential trial motions brought to avoid dismissal under NRCP 41(e) and advocates instead for adoption of the factors set forth in the California Supreme Court's decision in *Salas v. Sears, Roebuck & Co.*, 721 P.2d 590 (Cal. 1986), to guide the resolution of such motions. Contrary to the dissent's position, the approach set forth in *Monroe* provides a straightforward methodology that can be easily implemented by the district courts to resolve preferential trial motions brought under these circumstances, and thus, we see no reason to cast aside our existing precedent in favor of the approach favored by the dissent.

and the resulting dismissal of this case pursuant to NRCP 41(e) must be reversed and remanded to the district court with instructions to grant appellant a preferential trial date.[3] This conclusion does not end our analysis, however, as, given that the five-year period had expired at the time that appellant's complaint was dismissed, it becomes necessary to determine how much time appellant should have, on remand, to bring his case to trial. Our examination of this court's precedent determining how much time a plaintiff has, under NRCP 41(e), to bring his or her case to trial following a reversal and remand of an erroneous judgment or dismissal entered in a case that has not yet been brought to trial reveals inconsistencies in how this court has resolved that issue.

We begin with this court's 1981 case, *McGinnis v. Consolidated Casinos Corp.*, 97 Nev. 31, 623 P.2d 974 (1981), in which the court addressed the impact of an earlier appellate reversal and remand of an order dismissing the underlying case on the running of the NRCP 41(e) period. To resolve the issue, the *McGinnis* court considered the relevance of the portion of NRCP 41(e) providing that, '' '[w]hen in an action after judgment, an appeal has been taken and judgment reversed with [the] cause remanded for a new trial . . . the action must be dismissed . . . unless brought to trial within [3] years from the date upon which remittitur is filed by the clerk of the trial court' '' to situations in which an errant judgment, entered prior to the commencement of trial, is reversed and remanded on appeal. *Id.* While noting the rule's silence with regard to cases in which trial had not yet commenced, the *McGinnis* court nonetheless concluded that the policy considerations that underlie NRCP 41(e)'s express grant of three years to bring a case to trial when an erroneous judgment is reversed and remanded for a new trial were equally applicable in cases where an errant judgment is reversed and remanded for trial in the first instance. *Id.* As a result, the *McGinnis* court held that, when a judgment entered before trial has commenced is reversed on appeal, on remand, the parties have three years from the date the remittitur is filed in district court to bring the case to trial. *Id.* Subsequent to this court's issuance of the *McGinnis* decision, this court has applied or acknowledged the rule adopted in that case on several occasions. *See, e.g.*, *Monroe v. Columbia Sunrise Hosp.*, 123 Nev. 96, 102, 158 P.3d 1008, 1011-12 (2007); *Bell & Gossett Co. v. Oak Grove Investors*, 108 Nev. 958, 961-62, 843 P.2d 351, 353 (1992); *Massey v. Sunrise Hospital*, 102 Nev. 367, 369-70, 724 P.2d 208, 209-10 (1986).

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[3]In light of our decision with regard to the preferential trial issue, we need not address appellant's remaining contentions. Additionally, to the extent that respondent's arguments in support of affirming the district court's decision are not discussed herein, we have fully considered those arguments and found them to be without merit.

In 2004, without any mention of the *McGinnis* opinion, this court applied a different rule in *Rickard v. Montgomery Ward & Co.*, 120 Nev. 493, 498-99, 96 P.3d 743, 747 (2004), to determine the time remaining to bring a case to trial on remand from a reversal of a district court's order dismissing a case for failure to bring the matter to trial within the NRCP 41(e) five-year period. The *Rickard* court reversed the five-year dismissal at issue in that appeal based on its conclusion that the time in which the case had been subject to a bankruptcy stay should have been excluded from the calculation of the five-year period, and thus, the time for bringing the case to trial had not yet expired when the district court dismissed the case. 120 Nev. at 498, 96 P.3d at 747. Apparently, operating under the view that, on remand, a plaintiff would generally only have the remaining portion of the five-year period to bring his or her case to trial, the *Rickard* court noted that only a short time remained in the five-year period when the case was dismissed and that the court failed to see how the case could be calendared and brought to trial in the time remaining. *Id.* at 498-99, 96 P.3d at 747. As a result, to ensure that sufficient time would be available to allow the appellant to bring the case to trial on remand, the *Rickard* court concluded that, for equitable reasons, the appellant should be given a ''reasonable period of time to set and bring his case to trial,'' provided he acted expeditiously. *Id.* at 499, 96 P.3d at 747.

In light of the inconsistent rules employed in *McGinnis* and *Rickard* to determine the time a plaintiff has to bring his or her case to trial following the reversal and remand on appeal of an erroneous pretrial judgment or dismissal and the inherent incompatibility of the three-year and reasonable period of time rules applied in those decisions, we take this opportunity to clarify our precedent with regard to this issue. Having fully evaluated the methodology adopted in the *McGinnis* and *Rickard* decisions, we conclude that the *McGinnis* rule constitutes the better-reasoned approach, as, unlike the ambiguous reasonable period for bringing a case to trial utilized in *Rickard*, which could vary widely depending on the judicial district in which the case is pending and the volume of cases on the district court's docket, the provision of a fixed three years to bring a case to trial provides the parties with certainty as to the time remaining, on remand, to bring the case to trial and avoid a subsequent dismissal under NRCP 41(e). Accordingly, we reaffirm *McGinnis*'s holding that, when an erroneous judgment or dismissal entered before trial has commenced is reversed on appeal, on remand, the parties have three years from the date that the remittitur is filed in district court to bring the case to trial in the first instance, *McGinnis*, 97 Nev. at 33, 623 P.2d at 975, and we overrule *Rickard* to the extent that it is inconsistent with this conclu-

sion.[4] As a result, on remand of the instant matter to the district court, appellant shall have three years from the date that the remittitur is filed in district court to bring his case to trial.[5]

CONCLUSION

In resolving a motion for a preferential trial date brought to avoid dismissal under NRCP 41(e)'s five-year rule, district courts must evaluate (1) the time remaining in the five-year period when the motion is filed, and (2) the diligence of the moving party and his or her counsel in prosecuting the case. Applying these factors to the present case, because appellant filed his preferential trial motion with more than three months remaining in the five-year period and the record reflects that appellant diligently moved his case forward, we conclude that the district court abused its discretion in denying appellant's motion for a preferential trial date. As a result, we reverse the district court's denial of that motion and the resulting dismissal of the underlying case pursuant to NRCP 41(e), and we remand this matter to the district court with instructions to grant appellant a preferential trial date.

In addition, we reaffirm the holding in *McGinnis v. Consolidated Casinos Corp.*, 97 Nev. 31, 623 P.2d 974 (1981), that on remand from an erroneous judgment or dismissal entered before trial has commenced that is reversed on appeal, the parties have three years from the date that the remittitur is filed in district court to bring the case to trial. To the extent that *Rickard v. Montgomery Ward & Co.*, 120 Nev. 493, 498-99, 96 P.3d 743, 747 (2004), is inconsistent with *McGinnis*'s conclusion, it is overruled.

SAITTA, C.J., and DOUGLAS, GIBBONS, HARDESTY, and PARRAGUIRRE, JJ., concur.

PICKERING, J., dissenting:

The error that leads the majority to find a reversible abuse of discretion by the district court originated with the appellant, Carstarphen, and his counsel, not the district court. Because a civil

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[4]In *Johann v. Aladdin Hotel Corp.*, 97 Nev. 80, 82, 624 P.2d 493, 494 (1981), this court, in reversing a dismissal under NRCP 41(e)'s five-year rule, decreed, without explanation, that on remand the case was to be brought to trial within 120 days of receipt of the remittitur. As we reaffirm the *McGinnis* rule, we necessarily reject *Johann*'s conclusion that, on remand, such cases must be brought to trial within 120 days.

[5]As noted in our December 31, 2008, order, this court will not consider appellant's challenge to the district court's award of costs to respondent. In light of our disposition of this matter, however, appellant is not precluded from moving the district court for relief from that award. Additionally, appellant's request for costs on appeal, made in his opening brief, is denied.

litigant may not secure reversal of an adverse judgment based on an error he invited, I respectfully dissent. I also disagree with, and therefore dissent from, the test the majority announces for judging preferential-trial-setting motions in the NRCP 41(e) context. In my view, the new test is incomplete and, in its incompleteness, potentially disruptive and unfair.

RELEVANT FACTS AND PROCEDURAL HISTORY

Carstarphen filed this case on March 3, 2003. Under NRCP 41(e), he had until March 3, 2008, to bring the action to trial. In October 2007, Carstarphen changed counsel; his new counsel recognized that the existing May 12, 2008, trial date went beyond NRCP 41(e)'s five-year limit. This led Carstarphen to file two alternative motions in the district court. The first asked the district court to find that ''the parties . . . implicitly agreed to waive the five[-]year rule'' when, in August 2007, they had stipulated to vacate an earlier trial date and reset it for May 2008. The second asked the district court to grant Carstarphen ''an order of preference in setting [the] case for trial'' before March 3, 2008, when the five-year rule otherwise would run.

In the district court, Carstarphen presented these as alternative motions and expressed a distinct preference for the first, the implicit-waiver motion. Thus, Carstarphen described the second, preferential-setting motion as a ''fallback''; acknowledged that the relief it sought would impose a ''burden [on the district] Court, the parties and their counsel, and the prospective jury in this case of having to bring this case to trial prior to the expiration of the five[-]year rule''; and affirmed that ''Carstarphen and his counsel are fine with the current May 12, 2008, trial date so long as the Five Year [implicit-waiver] Motion is again granted.'' Carstarphen advised the court that ''[i]f the Five Year Motion [is] granted, this Motion [for preferential trial setting] will be moot.''

Consistent with his strategic preference for the implicit-waiver motion—and the extra weeks of trial-preparation time it bought his newly substituted counsel—Carstarphen did not counter Milsner's showings, in opposition to the preferential-setting motion, that: (1) Carstarphen still owed Milsner long-promised party and expert discovery; (2) Carstarphen had protectively refiled his case in federal court in case his five-year-rule motions failed; (3) expert witness availability was doubtful; and (4) Milsner's counsel had two trials scheduled already for February, making a trial in February instead of May in this action difficult, if not impossible. Unlike Carstarphen, who offered mainly argument, not evidence, to support his motions, Milsner substantiated his arguments with affi-

davits, requests for judicial notice, and exhibits, which were included in respondent's separate appendix on this appeal.

Given this record, it is not surprising that, on December 14, 2007, the district court granted the first of Carstarphen's alternative motions (the implicit-waiver motion) and summarily denied the second (the preferential-setting motion). It did so in terms taken almost verbatim from Carstarphen's papers: ''The Court finds Defendants, by stipulating to vacate the October trial date and agreeing to set trial in May 2008, *implicitly agreed* to extend the five-year rule of NRCP 41(e).'' (Emphasis added.) No further motions were filed in the case until March 5, 2008, when Milsner moved to dismiss based on *Prostack v. Lowden*, 96 Nev. 230, 231, 606 P.2d 1099, 1099-1100 (1980), which holds that only an express agreement, not an implicit one, will suspend NRCP 41(e).

ANALYSIS

Prostack's facts are similar, if not identical, to those presented here. The plaintiffs moved for and were granted a preferential trial setting to avert an impending five-year rule dismissal. *Id.* at 230, 606 P.2d at 1099. Thereafter, to deal with a late-disclosed witness, the defendants moved to vacate the existing trial date. *Id.* at 231, 606 P.2d at 1099. The plaintiffs did not oppose the motion, and the district court reset the trial to a date beyond the five-year rule deadline. *Id.* After the five-year rule deadline had passed, the defendants moved to dismiss under NRCP 41(e). *Id.* The plaintiffs argued that, implicit in the defendants' unopposed request for additional discovery and a new trial date, was their agreement to waive the five-year rule. *Id.* The district court disagreed and dismissed the case. *Id.* This court affirmed, holding that ''[o]ur previous decisions construing NRCP 41(e) clearly indicate that mandatory dismissal for failure to bring an action to trial within five years from the filing of the complaint can be avoided only by a written stipulation between the parties extending the time.'' *Id.* (citing *Johnson v. Harber*, 94 Nev. 524, 582 P.2d 800 (1978)). We further stated that ''[i]t is upon the plaintiffs, the appellants here, that the duty rests to bring the case to trial within the period specified by the rule.'' *Id.* at 231, 606 P.2d at 1100.

Applying *Prostack*, the district court's dismissal should be affirmed, not reversed. Carstarphen made a legal error when he assumed, as the plaintiffs did in *Prostack*, that a stipulation to vacate and reset an existing trial date implicitly waives the five-year rule. This legal error led Carstarphen to commit three additional errors: (1) to urge the district court to deny his preferential-setting motion as moot if it granted his implicit-waiver motion; (2) not to develop his motion for a preferential trial setting or respond mean-

ingfully to Milsner's opposition to it; and (3) to fail to recognize the error in the December 14, 2007, ''implicit waiver'' order until the five-year rule ran on March 4, 2008.[1]

'' 'The doctrine of ''invited error'' embodies the principle that a party will not be heard to complain on appeal of errors which he himself induced or provoked the [district] court . . . to commit.' '' *Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994) (quoting 5 Am. Jur. 2d *Appeal and Error* § 713 (1962)). Reversal based on errors Carstarphen ''induced or provoked'' is inappropriate. The invited error doctrine applies, not just to the failure to recognize that *Prostack* defeats the implicit-waiver argument on which Carstarphen chiefly relied, but also to Carstarphen's failure to recognize and argue that the preferential-setting motion had to be granted or certain dismissal would follow under NRCP 41(e). I am hard-pressed to find, consistent with *Pearson*, an abuse of discretion by the district court in failing to recognize the dire consequences to Carstarphen of crediting his lawyer's arguments. *Cf. Nelson v. Napolitano*, 657 F.3d 586, 590-91 (7th Cir. 2011) (''the district court [is not] obliged to research and construct legal arguments for parties, especially when they are represented by counsel,'' ''is not obliged to grant relief from a lawyer's mistaken reading of a rule or statute,'' and ''abuses its discretion only when no reasonable person could agree with [its] decision'').

Carstarphen's failure to develop a record on the preferential-trial-setting motion leads the majority to adopt a rule that is so broad as to be unworkable: A district court commits an abuse of discretion when it denies a cursory preferential-setting motion if the record demonstrates some diligence and the motion is made more than three months before trial. While I agree that, in an appropriate case, a district court has discretion to grant a litigant a preferential trial setting to avoid NRCP 41(e)'s five-year rule, the factors that inform that discretion, and our deferential review

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[1]These errors, while understandable, differ little from the errors held insufficient to overcome NRCP 41(e)'s mandatory five-year rule in our established precedent. *See Allyn v. McDonald*, 117 Nev. 907, 912, 34 P.3d 584, 587 (2001) (''except in very limited circumstances, we uphold NRCP 41(e) dismissals without regard to the plaintiff's reasons for allowing the mandatory period to lapse'' (footnote omitted)); *Johnson*, 94 Nev. at 526, 582 P.2d at 801 (''Although appellant appears to be the victim of unfortunate circumstances, this Court has consistently held that dismissal pursuant to NRCP 41(e) for failure to bring to trial a claim within five years of filing the complaint is mandatory.'' (citing cases)); *Thran v. District Court*, 79 Nev. 176, 181, 182, 380 P.2d 297, 300 (1963) (dismissal is mandatory when the five-year mark is passed: ''the exercise of discretion is not involved'' and ''[p]rejudice is presumed''); *see also De Santiago v. D and G Plumbing, Inc.*, 65 Cal. Rptr. 3d 882, 887 (Ct. App. 2007) (''The exercise of reasonable diligence includes a duty 'to monitor the case in the trial court to ascertain whether any filing, scheduling or calendaring errors have occurred.' '' (quoting *Tamburina v. Combined Ins. Co. of America*, 54 Cal. Rtpr. 3d 175, 184 (2007)).

of its exercise, should be much more inclusive than the majority suggests.

Nevada has historically consulted California law, which also has a five-year rule, in interpreting NRCP 41(e). *Thran v. District Court*, 79 Nev. 176, 179, 380 P.2d 297, 299 (1963). In *Salas v. Sears, Roebuck & Co.*, 721 P.2d 590, 594 (Cal. 1986), the California Supreme Court, after considerable debate, set out the factors that should guide a district court in assessing a motion for preferential trial setting to avoid a five-year deadline like that in NRCP 41(e):

> a trial court does not have a mandatory duty to set a preferential trial date, even when the five-year deadline approaches. Its discretion is not wholly unfettered: it must consider the ''total picture,'' . . . including the condition of the court calendar, dilatory conduct by plaintiff, prejudice to defendant of an accelerated trial date, and the likelihood of eventual mandatory dismissal if the early trial date is denied.

Applying a ''total picture'' approach, Carstarphen cannot demonstrate an abuse of discretion (assuming, arguendo, he could avoid the invited error doctrine). While the record shows some case activity and Carstarphen's motions were filed three months before the five-year rule would run, he failed to address the prejudice to Milsner, the mitigating factor of the parallel federal suit, the discovery he (Carstarphen) still owed, the availability of witnesses, including experts, Milsner's trial counsel's calendar, the case's complexity, and the district court's calendar. These factors needed to be vetted in the district court but they were not, because Carstarphen did not press the motion for preferential trial setting. On this record, an abuse of discretion has not been shown.

Respectfully, I dissent.

MARC FINKEL, AN INDIVIDUAL, APPELLANT, *v.* CASHMAN PROFESSIONAL, INC., A NEVADA CORPORATION; CASHMAN ENTERPRISES, INC., A NEVADA CORPORATION; AND CASHMAN PHOTO ENTERPRISES OF NEVADA, A NEVADA CORPORATION, RESPONDENTS.

No. 54520

MARC FINKEL, AN INDIVIDUAL; IQ VARIABLE DATA, LLC, A NEVADA CORPORATION; RICHARD CLARK, AN INDIVIDUAL; AND MFRC VENTURES, LLC, DBA INFLUENT SOLUTIONS, A NEVADA CORPORATION, APPELLANTS, *v.* CASHMAN PROFESSIONAL, INC., A NEVADA CORPORATION; CASHMAN ENTERPRISES, INC., A NEVADA CORPORATION; AND CASHMAN PHOTO ENTERPRISES OF NEVADA, A NEVADA CORPORATION, RESPONDENTS.

No. 55377

March 1, 2012 270 P.3d 1259

Consolidated appeals from district court orders granting a preliminary injunction and refusing to dissolve the preliminary injunction in a contract action. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

Former employer brought action against former employee alleging breach of consulting agreement and seeking a preliminary injunction to enforce the agreement's restrictive covenants. The district court granted injunction. Employee exercised his right to terminate agreement and moved to dissolve injunction, but the district court denied motion. Employee appealed from both orders. Upon consolidation, the supreme court, PARRAGUIRRE, J., held that: (1) remand was necessary so that the district court could make determinations regarding whether former employer's contracts, customer lists, process, and prices remained protected as trade secrets; and (2) the district court abused its discretion by denying former employee's motion to dissolve the preliminary injunction to the extent that it restricted former employee's business activities based on the terminated consulting agreement.

Affirmed (Docket No. 54520); reversed and remanded (Docket No. 55377).

[Rehearing denied April 27, 2012]

Law Office of Daniel Marks and *Adam Levine, Daniel Marks*, and *Christopher L. Marchand*, Las Vegas, for Appellants.

Kravitz, Schnitzer, Sloane & Johnson, Chtd., and *Michael B. Lee* and *Martin J. Kravitz*, Las Vegas, for Respondents.

1. INJUNCTION.
   A preliminary injunction is available when the moving party can demonstrate that the nonmoving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory relief is inadequate and that the moving party has a reasonable likelihood of success on the merits.
2. APPEAL AND ERROR.
   The supreme court reviews a district court's issuance of a preliminary injunction for an abuse of discretion.
3. APPEAL AND ERROR.
   A decision that lacks support in the form of substantial evidence is arbitrary or capricious and, therefore, an abuse of discretion.
4. EVIDENCE.
   ''Substantial evidence'' has been defined as that which a reasonable mind might accept as adequate to support a conclusion.
5. INJUNCTION.
   Substantial evidence supported the district court's conclusion that former employee's conduct likely breached multiple provisions of the consulting agreement with former employer and, if true, would likely cause irreparable harm to former employer, as required for issuance of a preliminary injunction; the agreement restricted former employee's ability to engage in a competing business, but he proceeded to acquire and operate the only printing company in Las Vegas that could provide overnight printing of wedding photo books, which employer had previously used as an outside-service provider, former employee approached several of employer's customers urging them to move their business to his printing company, he referred to executives at former employer as untrustworthy, swindling snakes, and he attempted to induce other employees to leave employer.
6. ANTITRUST AND TRADE REGULATION.
   Whether information is a trade secret generally is a question of fact.
7. ANTITRUST AND TRADE REGULATION.
   Factors to consider in determining if something is a trade secret include: (1) the extent to which the information is known outside of the business and the ease or difficulty with which the acquired information could be properly acquired by others; (2) whether the information was confidential or secret; (3) the extent and manner in which the employer guarded the secrecy of the information; and (4) the former employee's knowledge of customer's buying habits and other customer data and whether this information is known by the employer's competitors. NRS 600A.030(5)(a), (b).
8. INJUNCTION.
   Substantial evidence supported the district court's conclusion that the information allegedly misappropriated by former employee was likely confidential trade secrets and that such misappropriation would result in irreparable harm to former employer, making preliminary injunctive relief appropriate; former employee acquired intimate knowledge of employer's confidential information while employed as an executive, including employee's contracts, customers, processes, prices, and other business-related confidential information, and employer went to extreme measures to protect its customer information, as only four people had access to its contracts and customer data. NRS 600A.030(5)(a), (b).
9. APPEAL AND ERROR.
   Remand was necessary in breach of contract action against former employee so that the district court could make determinations regarding

whether former employer's contracts, customer lists, process, and prices remained protected as trade secrets, warranting continued imposition of preliminary injunction preventing former employee from using such information. NRS 600A.040(1).

10. INJUNCTION.

The district court abused its discretion by denying former employee's motion to dissolve the preliminary injunction to the extent that it restricted former employee's business activities based on the terminated consulting agreement, as there was no longer any basis for enforcing that portion of the injunction.

Before SAITTA, C.J., HARDESTY and PARRAGUIRRE, JJ.

OPINION

By the Court, PARRAGUIRRE, J.:

In this appeal, we review two district court orders: one granting a preliminary injunction to enforce restrictive provisions in a consulting agreement (the Agreement) and to prevent likely violations of Nevada's Uniform Trade Secrets Act, and the other refusing to dissolve that preliminary injunction after the Agreement had been terminated. Because substantial evidence supports the district court's findings that appellant likely breached the Agreement and violated Nevada's Uniform Trade Secrets Act, we affirm the district court's order granting respondents' request for preliminary injunctive relief. However, upon termination of the Agreement, the district court should have granted appellant's motion to dissolve the injunctive provisions that were grounded on findings that appellant likely breached the Agreement. With regard to the alleged trade secret violations, NRS 600A.040(1) requires the district court to make findings as to the continued existence of a trade secret and to what constitutes a ''reasonable period of time'' for maintaining an injunction under Nevada's Uniform Trade Secrets Act. Because the district court failed to make these findings, we reverse the district court's second order and remand to the district court for further proceedings regarding the extent that the injunctive provision related to likely violations of the Trade Secrets Act should continue to remain in effect.

FACTS AND PROCEDURAL HISTORY

Beginning in 2001, appellant Marc Finkel was employed in various executive positions at respondent Cashman Professional, Inc., which is affiliated with respondents Cashman Enterprises, Inc., and Cashman Photo Enterprises of Nevada (collectively, Cashman). During his employment, Finkel performed various tasks designed to expand and streamline Cashman's Las Vegas-based wedding photography business. Among other things, Finkel designed

business software, negotiated sales contracts with customers, developed new sales strategies, drafted employment agreements, created training programs, and implemented new management techniques for the business.

Cashman went to great lengths to keep the above aspects of its business confidential. In particular, Finkel was one of only four people with access to Cashman's contracts, which were kept under lock and key to thwart attempts of underbidding by competitive companies.

Accordingly, when Finkel left his employment with Cashman in 2008, Cashman and Finkel entered into the Agreement, which, in large part, was designed to maintain the confidentiality of this information following Finkel's departure. The Agreement provided that Finkel would serve as a consultant to Cashman and would abide by several restrictive covenants in exchange for certain compensation. The restrictive covenants prohibited Finkel from engaging in a competing business, disparaging Cashman, soliciting Cashman's employees, and disclosing Cashman's confidential information.

In early 2009, Finkel purchased a printing company called IQ Variable Data, LLC (IQ), which he renamed as Influent Solutions. According to the parties, IQ was the only printing company in Las Vegas that could provide overnight printing of wedding photo books, and Cashman's photography business relied on IQ when overnight printing services were required. Finkel continued to provide the same services as IQ through Influent Solutions, and in doing so, he enlisted several Cashman employees to help establish his business. Finkel also approached at least two of Cashman's customers and solicited them to move their entire wedding photo and print production to Influent Solutions.

Detecting a threat to its business interests, Cashman filed a motion in the district court alleging breach of the Agreement and, in part, seeking a preliminary injunction to enforce the Agreement's restrictive covenants. The district court granted Cashman's request for a preliminary injunction in August 2009, concluding that Finkel had likely violated several provisions in the Agreement and misappropriated trade secrets in violation of Nevada's Uniform Trade Secrets Act, and that Cashman would suffer irreparable injury absent the issuance of an injunction. The preliminary injunction prevented Finkel from engaging in a competing business, making disparaging remarks about Cashman, soliciting Cashman's employees, and disclosing Cashman's confidential information. It further enjoined Finkel from misappropriating Cashman's trade secrets.

Finkel appealed from the preliminary injunction order and later informed Cashman that he was exercising his right to terminate the Agreement. Because the restrictive covenants were only applicable while the Agreement was in effect, Finkel then filed a mo-

tion to dissolve the preliminary injunction upon termination of the Agreement. After a hearing, the district court entered an order in January 2010, denying Finkel's motion to dissolve the injunction, finding that termination of the Agreement did not end the district court's authority to protect Cashman from an unfair competitive scenario. Finkel appealed from the order refusing to dissolve the injunction, and this court consolidated the two matters for resolution.

DISCUSSION

On appeal, Finkel first argues that the district court abused its discretion by issuing the preliminary injunction because substantial evidence does not support that Cashman would suffer irreparable harm and that Cashman would likely succeed in establishing that Finkel had breached the Agreement or misappropriated trade secrets.[1] As explained below, we disagree.

The order issuing the preliminary injunction was supported by substantial evidence

[Headnote 1]

''A preliminary injunction is available when the moving party can demonstrate that the nonmoving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory relief is inadequate and that the moving party has a reasonable likelihood of success on the merits.'' *Boulder Oaks Cmty. Ass'n v. B & J Andrews*, 125 Nev. 397, 403, 215 P.3d 27, 31 (2009).

Standard of review

[Headnotes 2-4]

This court reviews a district court's issuance of a preliminary injunction for an abuse of discretion. *Guerin v. Guerin*, 114 Nev. 127, 134, 953 P.2d 716, 721 (1998), *abrogated on other grounds by Pengilly v. Rancho Santa Fe Homeowners*, 116 Nev. 646, 648-49, 5 P.3d 569, 570-71 (2000). ''A decision that lacks support in the form of substantial evidence is arbitrary or capricious and,

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[1]Finkel makes two alternative arguments. First, he argues that Cashman failed to provide him the contractually mandated notice and opportunity to cure before enforcing the Agreement. Although such actions would be required prior to termination, the Agreement does not mandate that notice and an opportunity to cure be given before an injunction is sought. Thus, we conclude that this argument lacks merit.

Finkel also argues that the preliminary injunction should be held void for vagueness, claiming that he could not ascertain which actions were prohibited. We find this argument unpersuasive, as the district court made detailed findings in enjoining Finkel's actions when issuing the preliminary injunction, and we conclude that he was sufficiently informed as to which acts were prohibited.

therefore, an abuse of discretion.'' *Stratosphere Gaming Corp. v. Las Vegas*, 120 Nev. 523, 528, 96 P.3d 756, 760 (2004) (quotation omitted). ''Substantial evidence has been defined as that which a reasonable mind might accept as adequate to support a conclusion.'' *McClanahan v. Raley's, Inc.*, 117 Nev. 921, 924, 34 P.3d 573, 576 (2001) (quotations omitted).

Irreparable harm and likelihood of success on the merits

[Headnote 5]

Finkel argues that the record lacks substantial evidence to support the district court's conclusion that Cashman would likely succeed on the merits on its breach of contract and related claims or that it would suffer irreparable harm absent the issuance of the injunction.

This court has held in the context of an appeal from an order granting an injunction that ''acts committed without just cause which unreasonably interfere with a business or destroy its credit or profits, may do an irreparable injury.'' *Sobol v. Capital Management*, 102 Nev. 444, 446, 726 P.2d 335, 337 (1986). Here, the district court found that Finkel likely competed with Cashman, solicited Cashman's employees, disparaged Cashman, disclosed Cashman's confidential information, and misappropriated Cashman's trade secrets.

Contrary to Finkel's arguments, substantial record evidence supports the district court's conclusions. First, the Agreement restricted Finkel's ability to engage in a competing business, defined in part as any commercial photography or related service offered by Cashman, whether performed internally or by an *outside service*. It is undisputed that Finkel proceeded to acquire and operate the only vendor for wedding albums who could provide next-day printing in the relevant area, and that IQ had performed as an outside-service provider for Cashman in the past. Finkel argues that this fact is insufficient to show that he was participating in a competing business because Influent Solutions offered a variety of other commercial printing services. However, this does not undermine the district court's conclusion that Influent Solutions was in competition with Cashman, especially in light of Finkel's admission that he approached several of Cashman's customers, urging them to move their business to Influent Solutions.

Second, the Agreement prohibited Finkel from making any type of disparaging or derogatory remarks regarding Cashman. The record indicates that Finkel repeatedly violated this clause by referring to Cashman executives as untrustworthy, swindling ''snake[s],'' and other similar remarks.

Next, the Agreement restricted Finkel from inducing or attempting to induce any Cashman employee to leave Cashman.

Here, the record indicates that Finkel likely violated this condition, as at least four Cashman employees visited Influent Solutions while still employed by Cashman, and Finkel made more than 155 calls lasting a total of 1,104 minutes to those employees. Also, Finkel enlisted one Cashman employee to set up his telephone and computer network and another employee to arrange a business meeting with one of Cashman's customers. Although Finkel argues that he did not violate the Agreement, since he only temporarily employed these individuals, the Agreement prohibited any attempt to induce a Cashman employee.

Finally, the Agreement prohibited Finkel from disclosing any nonpublic information, including information regarding Cashman's plans, pricing, customers, processes, or other data of any kind. The record supports that Finkel identified several of Cashman's customers in his online biography and that he described his invention of Cashman's point-of-sale operating system. Also, Finkel informed at least one outside party of Cashman's confidential pricing structures and marketing plans.

This is the precise sort of conduct that could cause a business irreparable harm. *Sobol*, 102 Nev. at 446, 726 P.2d at 337 (determining that where a person has ''interfere[ed] with the operation of a legitimate business by creating public confusion, infringing on goodwill, and damaging reputation in the eyes of creditors,'' it may result in irreparable harm). Therefore, substantial evidence supported the district court's conclusion that Finkel's conduct likely breached multiple provisions of the party's Agreement and, if true, would likely cause irreparable harm to Cashman.

[Headnotes 6-8]

With respect to the district court's finding that Finkel likely misappropriated trade secrets, Finkel argues that any information that he may have used was not a ''trade secret.'' We disagree. Nevada's Uniform Trade Secrets Act, NRS Chapter 600A, provides that the ''[a]ctual or threatened misappropriation [of a trade secret] may be enjoined.'' NRS 600A.040(1). Broadly defined, a trade secret is information that ''[d]erives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public,'' as well as information that ''[i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy.'' NRS 600A.030(5)(a)-(b). Whether information is a trade secret generally is a question of fact. *See Frantz v. Johnson*, 116 Nev. 455, 466, 999 P.2d 351, 358 (2000). Factors to consider include:

> (1) the extent to which the information is known outside of the business and the ease or difficulty with which the ac-

> quired information could be properly acquired by others; (2) whether the information was confidential or secret; (3) the extent and manner in which the employer guarded the secrecy of the information; and (4) the former employee's knowledge of customer's buying habits and other customer data and whether this information is known by the employer's competitors . . . .

Id. at 467, 999 P.2d at 358-59 (quotation omitted).

Here, the district court found that Finkel acquired an intimate knowledge of Cashman's confidential information while employed as an executive for the company. This included Cashman's contracts, customers, processes, prices, and other business-related confidential information. Finkel acknowledged to the district court that confidential trade secrets would include: ''costs; discounts; future plans; business affairs; processes; . . . technical matters; customer lists; product designs; and, copyrights.'' While Finkel's admission is not necessarily dispositive of an item's trade-secret status, it may be considered as a factor weighing towards such classification.[2] *See Frantz*, 116 Nev. at 467, 999 P.2d at 358-59.

In addition to Finkel's admission, the parties' treatment of the above items tends to support their classification as trade secrets. *Frantz*, 116 Nev. at 466, 999 P.2d at 358. The record indicates that pricing schemes were kept confidential, the point-of-sale software was not shared with anyone outside the business, and Cashman required its employees to keep business-related information confidential. Moreover, Cashman went to extreme measures to protect its customer information, as only four people had access to its contracts and customer data. Thus, substantial evidence supports the district court's conclusion that the information allegedly misappropriated by Finkel would likely be confidential trade secrets and that such misappropriation could result in irreparable harm, making injunctive relief appropriate. *See Saini v. International Game Technology*, 434 F. Supp. 2d 913, 919 (D. Nev. 2006) (''[D]isclosure of confidential information or trade secrets'' creates serious harms, ''which are not readily addressed through payment of

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[2]Although Finkel admitted and the district court concluded that ''customer lists'' were confidential trade secrets, Finkel now argues that the identities of Cashman's well-known customers should not have been deemed confidential. *See Cambridge Filter v. Intern. Filter Co., Inc.*, 548 F. Supp. 1301, 1306 (D. Nev. 1982) (''Where the plaintiff's customers are known to competitors as potential customers, the plaintiff's customer list is not a trade secret.''). Although it is possible that not all of Cashman's relationships would have qualified as trade secrets, we decline to address this matter based on the district court's finding that Finkel likely misappropriated other protected information. Instead, we instruct the district court on remand to specify which business relationships are to be afforded trade-secret status.

economic damages, [and] are sufficient to meet the irreparable injury requirement for a preliminary injunction.'').

Upon termination of the Agreement, the district court should have dissolved the preliminary injunction as it applied to the restrictive covenants contained in the Agreement

[Headnote 9]

Finkel argues that the district court erred in refusing to dissolve the injunction despite termination of the Agreement. We agree with Finkel that the injunctive provisions that restricted his business activities based on his likely violations of the Agreement should have been dissolved once the Agreement was no longer enforceable. However, we do not necessarily agree that the injunctive provisions that applied to prevent likely trade secret violations should have been dissolved.

Although this is an issue of first impression in Nevada, the majority of courts that have considered this matter have declined to enforce an agreement not to compete after the period set forth in the agreement had expired. *Economics Laboratory, Inc. v. Donnolo*, 612 F.2d 405, 408 (9th Cir. 1979); *see also id.* at 409 (''There is no reason . . . to enforce a covenant which by its terms is no longer in effect.'').

[Headnote 10]

We agree with the Ninth Circuit's reasoning, and therefore conclude that the district court abused its discretion by denying Finkel's motion to dissolve the injunction to the extent that it restricted Finkel's business activities based on the terminated Agreement, as there was no longer any basis for enforcing that portion of the injunction.[3] Accordingly, we reverse the district court's second order to the extent that it maintains the injunctive provisions relating to Finkel's alleged breach of the Agreement and remand with instructions to grant Finkel's motion to dissolve as to this portion of the injunction.

This brings us to the remaining portion of the injunction, which was based on Finkel's likely trade-secret violations. An injunction entered under Nevada's Uniform Trade Secrets Act ''must be terminated when the trade secret has ceased to exist, but the injunc-

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[3]The district court seems to have recognized its error, as it subsequently purported to modify its second order by removing the injunctive provisions that were based on the Agreement in an order entered in February 2010. However, the district court lacked jurisdiction to modify the order because Finkel had already filed this appeal. *See Rust v. Clark Cty. School District*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987) (''a timely notice of appeal divests the district court of jurisdiction to act'').

tion may be continued for an additional reasonable period of time to eliminate commercial or other advantage that otherwise would be derived from the misappropriation.'' NRS 600A.040(1).

Here, the district court maintained the preliminary injunction on the independent basis that Finkel had likely misappropriated Cashman's trade secrets. While this may be a valid ground for maintaining a preliminary injunction beyond the termination date of the parties' agreement, we conclude that additional findings were required by the district court. First, NRS 600A.040(1) requires that an injunction be terminated when the trade secret no longer exists. Here, the district court should have made findings as to the extent that Cashman's contracts, customer lists, process, and prices remained protected as trade secrets. Assuming that trade secrets are found to exist, an injunction may only be extended for a ''reasonable period of time'' pursuant to NRS 600A.040(1). Thus, the district court should also have articulated a duration for extending the injunction pursuant to statute.

This conclusion is consistent with the comments to the Uniform Trade Secrets Act, which indicate that ''an injunction should last for as long as is necessary, but no longer than is necessary, to eliminate the commercial advantage or 'lead time' with respect to good faith competitors that a person has obtained through misappropriation.'' Unif. Trade Secrets Act § 2 cmt., 14 U.L.A. 620 (2005). Accordingly, such a determination should be made on a case-by-case basis by the district courts.

Therefore, we also reverse the part of the district court's January 2010 order in which it maintained the injunctive provisions based on Finkel's alleged misappropriation of trade secrets. On remand, the district court shall reconsider to what extent the injunctive provision should be maintained under NRS 600A.040(1) in light of this opinion.

CONCLUSION

Because substantial evidence exists to support the district court's decision to issue the preliminary injunction, we affirm the district court's first order. However, because the district court improperly relied on the terminated Agreement in declining to dissolve the injunction that prohibited Finkel from conducting business activities that likely violated the Agreement, and because the district court failed to make findings as to the continued existence of a trade secret and for what constitutes a ''reasonable period of time'' under NRS 600A.040(1), we reverse the district court's second order and remand for further proceedings consistent with this opinion.

SAITTA, C.J., and HARDESTY, J., concur.

CAFÉ MODA, LLC, DBA CAFÉ MODA, APPELLANT, *v.* DONNY PALMA AND MATT RYAN RICHARDS, RESPONDENTS.

No. 54703

March 1, 2012 272 P.3d 137

Appeal from a district court judgment on a jury verdict in a tort action. Eighth Judicial District Court, Clark County; Valorie J. Vega, Judge.

Stabbing victim brought action against fellow restaurant patron, who stabbed him repeatedly, on an intentional tort theory and against restaurant for negligence. Following jury trial in which verdict apportioned 80 percent of fault to the patron and 20 percent to the restaurant, the district court entered judgment against patron and restaurant, holding them jointly and severally liable for 100 percent of victim's damages. Restaurant appealed. The supreme court, PARRAGUIRRE, J., held that ''negligence'' meant fault in statute governing comparative negligence, and, thus, restaurant was jointly and severally liable for 20 percent of victim's damages.

Affirmed in part, reversed in part, and remanded.

[Rehearing denied April 30, 2012]

[En banc reconsideration denied June 19, 2012]

Lewis & Roca, LLP, and *Daniel F. Polsenberg, Joel D. Henriod*, and *Jacqueline A. Gilbert*, Las Vegas, for Appellant.

Law Offices of Michael A. Koning, P.C., and *Michael A. Koning*, Las Vegas, for Respondent Donny Palma.

Matt Ryan Richards, Las Vegas, in Proper Person.

1. APPEAL AND ERROR.
   The supreme court reviews questions of statutory construction de novo.
2. STATUTES.
   When considering a statute's application, the supreme court begins with its plain language.
3. NEGLIGENCE.
   The section of the comparative negligence statute that stated that, where recovery was allowed against more than one defendant, each defendant was severally liable to the plaintiff only for that portion of the judgment that represented the percentage of negligence attributable to that defendant, was ambiguous with regard to whether it permitted liability to be apportioned between a negligent tortfeasor and an intentional tortfeasor. NRS 41.141(4).
4. STATUTES.
   The supreme court determines the Legislature's intent by evaluating the legislative history and construing the statute in a manner that conforms to reason and public policy.

5. NEGLIGENCE.

The purpose of the comparative negligence statute is to ensure that a relatively low-fault plaintiff is not left completely without recourse and a negligent defendant's liability is limited to an amount proportionate with his or her fault. NRS 41.141.

6. NEGLIGENCE.

The word ''negligence,'' in the section of the comparative negligence statute that stated that, where recovery was allowed against more than one defendant, each defendant was severally liable to the plaintiff only for that portion of the judgment that represented the percentage of negligence attributable to that defendant, meant fault, and, thus, the restaurant that was found 20 percent at fault for stabbing victim's damages was jointly and severally liable for 20 percent of victim's damages in action by victim against restaurant for negligence and against restaurant patron, who stabbed victim, on an intentional tort theory. NRS 41.141(4).

Before DOUGLAS, HARDESTY and PARRAGUIRRE, JJ.

OPINION

By the Court, PARRAGUIRRE, J.:

In this appeal, we consider whether NRS 41.141, Nevada's comparative-negligence statute, permits liability to be apportioned between a negligent tortfeasor and an intentional tortfeasor. Concluding that NRS 41.141 is ambiguous in this regard, we construe the statute as permitting such an apportionment in order to give effect to the Legislature's intent. Having done so, we determine that the negligent tortfeasor, appellant Café Moda, is severally liable for 20% of respondent Donny Palma's damages and that the intentional tortfeasor, respondent Matt Richards, is jointly and severally liable for 100% of Palma's damages. We therefore affirm in part and reverse in part the district court's judgment holding the tortfeasors jointly and severally liable.

FACTS

Matt Richards and Donny Palma were patrons on Café Moda's premises. During an altercation between the two, Richards stabbed Palma repeatedly. Palma then brought suit against Richards and Café Moda, pursuing an intentional-tort theory of liability against Richards and a negligence theory of liability against Café Moda.

At trial, the jury rendered a verdict in favor of Palma. Having found that Palma had not been comparatively negligent, it apportioned 80% of the fault to Richards and the remaining 20% to Café Moda. Based upon its reading of NRS 41.141, however, the district court entered a judgment against Richards and Café Moda that held each of them jointly and severally liable for 100% of Palma's damages. This appeal followed.

DISCUSSION

On appeal, Café Moda contends that NRS 41.141 permits liability to be apportioned between a negligent tortfeasor and an intentional tortfeasor. Consequently, it maintains, the district court erred in holding it jointly and severally liable for 100% of Palma's damages when the jury found it to be only 20% at fault. As explained below, we agree.

Standard of review

[Headnote 1]

Whether NRS 41.141 permits liability to be apportioned between a negligent tortfeasor and an intentional tortfeasor involves a question of statutory construction, which this court reviews de novo. *In re Candelaria*, 126 Nev. 408, 411, 245 P.3d 518, 520 (2010).

Construing NRS 41.141 to permit apportionment of liability between a negligent tortfeasor and an intentional tortfeasor gives effect to the Legislature's intent

Although Palma's lawsuit against Café Moda and Richards involves straightforward common-law tort principles, the parties recognize that NRS 41.141 has supplanted much of the common law in terms of how liability should be imposed and apportioned amongst multiple defendants. *See Warmbrodt v. Blanchard*, 100 Nev. 703, 707-08, 692 P.2d 1282, 1285-86 (1984) (explaining that NRS 41.141 ''eliminat[ed]'' and ''abolished'' two common-law doctrines: (1) a plaintiff's contributory negligence as a complete bar to recovery, and (2) joint and several liability amongst negligent defendants), *superseded by statute on other grounds as stated in Countrywide Home Loans v. Thitchener*, 124 Nev. 725, 740-43, 192 P.3d 243, 253-55 (2008); *see also* 1973 Nev. Stat., ch. 787, at 1722 (listing a twofold purpose for enacting NRS 41.141). Thus, while the parties agree that NRS 41.141 governs the issue presented in this case, they disagree as to how.

[Headnotes 2, 3]

When considering a statute's application, we begin with its plain language. *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 370, 252 P.3d 206, 209 (2011). Here, the plain language of NRS 41.141 provides in relevant part as follows:

> 1. In any action to recover damages . . . in which comparative negligence is asserted as a defense, the comparative negligence of the plaintiff . . . does not bar a recovery if that negligence was not greater than the negligence or gross negligence of the parties to the action against whom recovery is sought.

. . . .

4. Where recovery is allowed against more than one defendant in such an action, *except as otherwise provided in subsection 5, each defendant is severally liable* to the plaintiff only for that portion of the judgment which represents *the* ***percentage of negligence*** *attributable to that defendant*.

5. This section does not affect the joint and several liability, if any, of the defendants in an action based upon:

. . .

(b) An intentional tort[.]

NRS 41.141 (emphases added).

Both Café Moda and Palma offer a plain-language application of the statute in support of their respective positions. Café Moda's plain-language argument illustrates NRS 41.141's general framework: Because Café Moda asserted comparative negligence as a defense (subsection 1), and because it was sued on a negligence theory, subsection 5(b)'s intentional-tort exception does not preclude application of subsection 4's general rule regarding several liability. Once under subsection 4, Café Moda contends that it is severally liable to Palma for only its portion of the judgment—here, 20%.

Palma's argument, on the other hand, relies on subsection 4's express use of the word ''negligence.'' By using the word ''negligence,'' Palma maintains that NRS 41.141 permits only ''negligence'' to be apportioned and that such apportionment must be done entirely with respect to the negligent parties in the case. Thus, Palma contends, when the jury found that he had not been comparatively negligent, it effectively apportioned 100% of the negligence to Café Moda, at which point the district court properly held Café Moda, the only negligent party, liable for 100% of the judgment. As for Richards, the intentional tortfeasor, Palma maintains that he also was properly held liable for 100% of the judgment under subsection 5(b)'s exception.[1]

Because both parties have presented a plausible plain-language application of the statute, we conclude that NRS 41.141 is ambiguous with respect to the question presented by this case. *Attorney General v. Nevada Tax Comm'n*, 124 Nev. 232, 240, 181 P.3d 675, 680-81 (2008) (''A statute is ambiguous when it is capable of being understood in two or more senses by reasonably informed

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[1]We reject Palma's alternative argument that his entire lawsuit was ''an action based upon . . . [a]n intentional tort.'' NRS 41.141(5)(b). While the *act* that precipitated his lawsuit against Café Moda and Richards was indeed an intentional tort, he nevertheless pursued a negligence cause of *action* against Café Moda. *See Chianese v. Meier*, 774 N.E.2d 722, 725 (N.Y. 2002) (rejecting an identical argument put forth by a plaintiff in a similar factual situation).

persons or it does not otherwise speak to the issue before the court.'' (quotation omitted)).

[Headnote 4]

Having concluded that NRS 41.141 is ambiguous, we must construe it in a manner that is consistent with the Legislature's intent. *Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. 528, 533, 245 P.3d 1149, 1153 (2010). ''[T]his court determines the Legislature's intent by evaluating the legislative history and construing the statute in a manner that conforms to reason and public policy.'' *Great Basin Water Network v. State Eng'r*, 126 Nev. 187, 196, 234 P.3d 912, 918 (2010).

[Headnote 5]

As mentioned previously, when the Legislature enacted NRS 41.141 in 1973, its purpose was to lessen the perceived unfairness in two of our common-law tort doctrines. *Warmbrodt*, 100 Nev. at 707-08, 692 P.2d at 1285-86 (describing NRS 41.141's effect). First, by eliminating a plaintiff's contributory negligence as a complete bar to recovery, the Legislature sought to ensure that a relatively low-fault plaintiff was not left completely without recourse. *See* 1973 Nev. Stat., ch. 787, § 1, at 1722; Hearing on S.B. 524 Before the Senate Judiciary Comm., 57th Leg. (Nev., April 6, 1973). Second, by abandoning joint and several liability amongst negligent defendants, the Legislature sought to ensure that a negligent defendant's liability would be limited to an amount proportionate with his or her fault. *See* 1973 Nev. Stat., ch. 787, at 1722; Hearing on S.B. 524 Before the Senate Judiciary Comm., 57th Leg. (Nev., April 6, 1973).

To a certain extent, these policy interests run counter to each other. Recognizing as much, the Legislature has amended NRS 41.141 on three occasions in an attempt to strike a fair balance. Below, we briefly summarize the evolution of NRS 41.141, as doing so helps us discern how the Legislature would intend for NRS 41.141 to be applied in this case.

In 1979, the Legislature amended NRS 41.141 by eliminating several liability for negligent defendants.[2] *See* 1979 Nev. Stat., ch. 629, § 6, at 1357. In essence, it brought back the common-law doctrine of joint and several liability and merely permitted one defendant to seek contribution from another codefendant. *Id.* § 1, at 1355. From a policy standpoint, this amendment shifted the balance toward ensuring that a plaintiff was not left without recourse.

In 1987, the Legislature again revisited NRS 41.141. This time, it re-implemented several liability amongst codefendants as the general rule, but it carved out five exceptions to this general rule for when joint and several liability would still apply. *See* 1987 Nev.

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[2]This elimination was subject to an exception not relevant here. *See* 1979 Nev. Stat., ch. 629, § 6, at 1357.

Stat., ch. 709, § 1, at 1697-98; NRS 41.141(4), (5). Considering the general rule and the five exceptions together, the practical effect of this amendment was to maintain joint and several liability for all types of defendants except for merely negligent defendants. From a policy standpoint, this amendment shifted the balance toward ensuring that a negligent defendant's liability would be limited.

The effect of the 1987 amendment was not lost on the Legislature when it again considered NRS 41.141 in 1989. During discussion of a bill to amend the statute, it was mentioned that the 1987 shift back to several liability for negligent defendants was ''designed to prevent the 'deep-pocket doctrine.' '' *See* Hearing on A.B. 249 Before the Senate Judiciary Comm., 65th Leg. (Nev., March 8, 1989). With this design in mind, the Legislature decided to maintain NRS 41.141's framework, choosing only to clarify the scope of one of the five exceptions. *See* 1989 Nev. Stat., ch. 39, § 1, at 72-73; NRS 41.141(6).

[Headnote 6]

NRS 41.141 has remained unchanged since 1989. Thus, in light of the statute's design, we consider how the Legislature would intend for NRS 41.141 to apply in this case. We start and finish by revisiting Palma's proffered application of the statute, which, again, relies upon subsection 4's use of the word ''negligence.'' Under Palma's proffered application, NRS 41.141 technically affords several liability to all negligent defendants. But because only ''negligence'' may be apportioned under his application, affording several liability to a negligent defendant provides no benefit unless the defendant has a codefendant who is also being sued on a negligence theory. Thus, in the case at hand where Café Moda's codefendant committed an intentional tort, Café Moda is effectively denied the statute's benefit of several liability.

Not only does Palma's proffered application run counter to the Legislature's design of NRS 41.141, but it produces the unreasonable result of hinging the extent of a negligent defendant's liability on another party's mindset.[3] *Meridian Gold v. State, Dep't of*

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[3]When considering this same issue with regard to their own comparative-negligence statutes, other jurisdictions have reached the same conclusion. *See, e.g.*, *Weidenfeller v. Star and Garter*, 2 Cal. Rptr. 2d 14, 15-16 (Ct. App. 1991) (''According to [plaintiff,] the statute has a limited effect benefitting a negligent tortfeasor only where there are other equally culpable defendants, but eliminating that benefit where the other tortfeasors act intentionally. Stating the proposition reflects its absurdity.''); *Reichert v. Atler*, 875 P.2d 379, 381 (N.M. 1994) (''We cannot find a sound basis in public policy to abrogate the legislature's determination that comparative-fault principles should apply; rather, we believe that public policy would support a holding that the bar owner may reduce his liability by the percentage of fault attributable to [an intentional tortfeasor].''); *Chianese*, 774 N.E.2d at 726 (''[Plaintiff's proposed application is] not only illogical but also inconsistent with the chief remedial purpose of [the statute].'').

Taxation, 119 Nev. 630, 633, 81 P.3d 516, 518 (2003) (''[W]e must construe statutory language to avoid absurd or unreasonable results.'' (quotation omitted)).

Accordingly, we must construe NRS 41.141 in a way that gives effect to the statute's design and the Legislature's intent. *Hardy Companies, Inc.*, 126 Nev. at 533, 245 P.3d at 1153. To do so, we construe subsection 4's use of ''negligence'' to mean ''fault.'' *Cf.* Hearing on S.B. 511 Before the Senate Judiciary Comm., 64th Leg. (Nev., May 13, 1987) (explaining that it is the jury's responsibility to allocate ''fault'' under NRS 41.141, notwithstanding subsection 4's use of the word ''negligence''); *Black's Law Dictionary* 683 (9th ed. 2009) (defining ''fault'' to encompass an array of wrongful conduct, regardless of the actor's intent). Such a construction gives effect to the statute's design, eliminates the unreasonable result inherent in Palma's proffered application, and leaves the remainder of the statute's language intact.

Under this construction, NRS 41.141's application to this case becomes straightforward. Because the jury found Café Moda to be 20% at fault, it is to be held severally liable for 20% of Palma's damages. And because our construction of the statute leaves subsection 5 unchanged, Richards remains jointly and severally liable for 100% of Palma's damages.

CONCLUSION

We conclude that NRS 41.141 is ambiguous with regard to whether liability may be apportioned between a negligent tortfeasor and an intentional tortfeasor. After reviewing NRS 41.141's legislative history, we believe that the most effective way to carry out the Legislature's intent is to construe NRS 41.141(4)'s use of the word ''negligence'' to mean ''fault.'' Having done so, we determine that appellant Café Moda is severally liable for 20% of respondent Donny Palma's damages and that respondent Matt Richards is jointly and severally liable for 100% of Palma's damages. We therefore reverse the part of the district court's judgment imposing joint and several liability against Café Moda and remand this matter so that the district court can enter a modified judgment reflecting this decision. All other aspects of the district court's judgment, not having been challenged, are affirmed.

DOUGLAS and HARDESTY, JJ., concur.

SCOTT J. WEBB, AN INDIVIDUAL, APPELLANT/CROSS-RESPONDENT, *v.* HARRY H. SHULL, AN INDIVIDUAL, RESPONDENT, AND CELEBRATE PROPERTIES, LLC, A NEVADA LIMITED LIABILITY COMPANY, RESPONDENT/CROSS-APPELLANT.

No. 55153

March 1, 2012 270 P.3d 1266

Appeal and cross-appeal from a district court judgment in a contract action. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Purchaser brought action against vendor, a limited liability company, and its former manager alleging various claims regarding failure to disclose soil-related construction defects. The district court awarded purchaser treble damages against vendor, but refused to find former manager liable as vendor's alter ego. Purchaser appealed and vendor cross-appealed. The supreme court, HARDESTY, J., held that: (1) statute governing remedies for nondisclosure of defects did not expressly or impliedly contain mental culpability requirement; and (2) treble damages awarded under statute were remedial, rather than punitive.

Affirmed in part, vacated in part, and remanded.

Maddox, Isaacson & Cisneros, LLP, and *Norberto J. Cisneros*, Las Vegas, for Appellant/Cross-Respondent.

Coleman Law Associates and *Edward S. Coleman*, Las Vegas, for Respondent and Respondent/Cross-Appellant.

1. APPEAL AND ERROR.
   The supreme court reviews issues of statutory construction de novo.
2. STATUTES.
   When interpreting a statute, the supreme court first looks to its language, and when the language is clear on its face, the court will not go beyond the statute's plain language.
3. ANTITRUST AND TRADE REGULATION.
   The statute governing remedies for a vendor's delayed disclosure or nondisclosure of defects in a sale of residential property did not expressly or implicitly condition the purchaser's entitlement to treble damages on the mental culpability level of the vendor; if intent were required to award treble damages in the first instance, there likely would be no need to include exceptions for relying on government or contractor statements, because doing so would have automatically negated the intent requirement. NRS 113.150.
4. ANTITRUST AND TRADE REGULATION.
   Treble damages awarded under the statute governing remedies for a vendor's delayed disclosure or nondisclosure of defects in a sale of residential property were remedial, rather than punitive, and thus were not dependent on the mental culpability of the vendor when the statute contained

no such requirement; although the statute did not characterize the treble damages as penalty or compensation, the Legislature declined to include a mental state element within the statute, overriding purpose of the statute was to create a statutory private right of action to award a victim adequate compensation to remedy an error or omission in disclosures made in the sale of a personal residence. NRS 113.150(4).

5. DAMAGES.
   Punitive damages are awarded not as compensation to the victim but to punish the offender for severe wrongdoing.
6. DAMAGES.
   In contrast to punitive damages, it is important to realize that treble damages have a compensatory side, serving remedial purposes in addition to punitive objectives.
7. DAMAGES.
   When an award of multiple treble damages is intended to serve penal purposes, it is a substitute for punitive damages, and the same or similar proof requirements usually must be satisfied.
8. DAMAGES.
   Multiple treble damages provisions may be enacted to serve remedial rather than punitive purposes, such as ensuring full compensation or encouraging private enforcement of the law.
9. DAMAGES.
   When treble damages are awarded for remedial purposes, they are not a substitute for punitive damages and the heightened proof requirements for punitive damages do not apply.

Before DOUGLAS, HARDESTY and PARRAGUIRRE, JJ.

OPINION

By the Court, HARDESTY, J.:

This is an appeal and cross-appeal from a district court judgment awarding appellant homebuyer treble damages against respondent seller, a limited liability company, but refusing to find that the individual respondent, a former manager of the limited liability company, is liable for the judgment as the company's alter ego.

We first consider the seller's cross-appeal, in which we address whether the district court's award of treble damages under NRS 113.150(4), a statute which awards treble damages for a seller's delayed disclosure or nondisclosure of property defects, requires a predicate finding of willfulness, or mental culpability. In this case, the district court did not make a finding concerning the seller's statutory liability that it acted willfully. Because we conclude that no such mental state was required, we affirm the district court on this issue. We conclude that the Legislature has the authority to establish the elements and measure of damages in a statutorily created claim. Thus, when a statute lacks an express or implicit mental culpability element, we presume that the Legislature intended to omit such an element. Furthermore, deferring to legislative intent,

we decline to imply a heightened level of mental culpability to a statute that is not punitive in nature.

We also briefly address the district court's denial of appellant's assertion that the individual manager is the alter ego of the company. But because the district court in this case failed to explain its reasoning for denying alter ego status, we are unable to review the alter ego issue. Accordingly, we affirm in part and vacate in part the district court's judgment, and we remand this matter to the district court on the alter ego issue.

FACTS AND PROCEDURAL HISTORY[1]

Appellant/cross-respondent Scott Webb purchased a home from respondent/cross-appellant Celebrate Properties, LLC. Celebrate was initially co-managed by respondent Harry Shull and another person, but management was later transferred to two companies, one of which was also managed by Shull.

Unbeknownst to Webb, the home had been sold once before. The initial purchasers of the home discovered soil-related construction defects and, pursuant to NRS Chapter 40, served notice of the construction defects, attaching an expert report in support of their claims. To settle that matter, respondents purchased the home back from the initial purchasers. In the repurchase, however, Celebrate could not obtain proper financing, so Shull purchased the home in his own name and then sold the residence to Celebrate for one dollar, with Shull's name remaining on the mortgage. The soil problems were not addressed, nor were they disclosed to Webb prior to purchase on the standard disclosure forms provided to him or otherwise, in violation of statutes that require such disclosures.

Upon discovering problems with the soil, Webb sued respondents, alleging various claims regarding the failure to disclose the soil-related construction defects and arguing that Shull was the alter ego of Celebrate. Webb sought, among other things, treble damages pursuant to NRS 113.150(4), a statute that awards treble damages for a seller's nondisclosure or delayed disclosure of known property defects. The district court found that Celebrate made negligent misrepresentations about the soil defects and failed to disclose them, and the court awarded treble damages under NRS 113.150(4). The district court also concluded, however, that Shull was not the alter ego of Celebrate and consequently rendered the judgment against Celebrate only. Webb appeals, challenging the

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[1]A trial transcript was not included in the record on appeal. Thus, we must assume the record supports the district court's findings. *See Borgerson v. Scanlon*, 117 Nev. 216, 221, 19 P.3d 236, 239 (2001) (stating that " '[w]hen evidence on which a district court's judgment rests is not properly included in the record on appeal, it is assumed that the record supports the lower court's findings' " (alteration in original) (quoting *Raishbrook v. Estate of Bayley*, 90 Nev. 415, 416, 528 P.2d 1331, 1331 (1974))).

district court's alter ego determination; Celebrate cross-appeals to challenge the award of treble damages. We address the cross-appeal first.

DISCUSSION

NRS 113.150 governs remedies for a seller's delayed disclosure or nondisclosure of defects in a sale of residential property. NRS 113.150(4) provides, in pertinent part, that with limited exceptions not applicable here, treble damages are warranted when a seller sells residential property without disclosing known defects:

> if a seller conveys residential property to a purchaser without complying with the requirements of NRS 113.130 or otherwise providing the purchaser . . . with written notice of all defects in the property of which the seller is aware, and there is a defect in the property of which the seller was aware before the property was conveyed to the purchaser and of which the cost of repair or replacement was not limited by provisions in the agreement to purchase the property, the purchaser is entitled to recover from the seller treble the amount necessary to repair or replace the defective part of the property, together with court costs and reasonable attorney's fees. . . .

Here, the district court awarded Webb treble damages on the ground that Celebrate was aware of the soil defects and breached its duty to disclose them. However, while the district court denied relief on Webb's claim for intentional misrepresentation, it did not make a finding that Celebrate acted willfully or intentionally in awarding damages under NRS 113.150(4). On cross-appeal, Celebrate argues that the district court erred when it awarded treble damages without finding grossly negligent, reckless, or intentional misconduct, because such a finding is required due to the treble damages' punitive nature. In response, Webb argues that because no level of mental culpability is mentioned in the statute, and because the statute states that the purchaser is ''entitled to'' treble damages for an undisclosed defect, the district court must award treble damages, regardless of the seller's mental state.

NRS 113.150(4) does not expressly or implicitly require a mental culpability level

[Headnotes 1, 2]

This court reviews issues of statutory construction de novo. *Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. 528, 533, 245 P.3d 1149, 1153 (2010). When interpreting a statute, we first look

to its language, and ''[w]hen the language . . . is clear on its face, 'this court will not go beyond [the] statute's plain language.' '' *J.E. Dunn Nw. v. Corus Constr. Venture*, 127 Nev. 72, 79, 249 P.3d 501, 505 (2011) (second alteration in original) (quoting *Great Basin Water Network v. State Eng'r*, 126 Nev. 187, 196, 234 P.3d 912, 918 (2010)).

[Headnote 3]

The language of NRS 113.150(4) lacks any reference to the seller's mental state. Confronting a similar issue, the United States Supreme Court declined to infer an intent requirement into a statute that did not expressly or implicitly contain such a requirement. *Dean v. United States*, 556 U.S. 568, 572 (2009). The Supreme Court explained that it '' 'ordinarily resist[s] reading words or elements into a statute that do not appear on its face.' '' *Id.* at 572 (quoting *Bates v. United States*, 522 U.S. 23, 29 (1997)). Thus, because the statute did ''not require that the [action at issue] be done knowingly or intentionally, or otherwise contain words of limitation,'' *id.* at 572, and because nothing in the statute's syntax or structure suggested that intent was required, the Court declined to ''contort[ ] and stretch[ ] the statutory language to imply an intent requirement.'' *Id.* at 574. Similarly, NRS 113.150 does not expressly require that the seller's nondisclosure be knowing or intentional, or otherwise contain words of limitation. Further, the statute's structure supports our conclusion that no heightened level of mental culpability is required. NRS 113.150(5) provides exceptions to the provision entitling a purchaser to treble damages, applicable in instances in which the seller relied on certain government or contractor statements in omitting information regarding a property defect:

> A purchaser may not recover damages from a seller pursuant to subsection 4 on the basis of an error or omission in the disclosure form that was caused by the seller's reliance upon information provided to the seller by:
>
> (a) An officer or employee of this State or any political subdivision of this State in the ordinary course of his or her duties; or
>
> (b) A contractor, engineer, land surveyor, certified inspector as defined in NRS 645D.040 or pesticide applicator, who was authorized to practice that profession in this State at the time the information was provided.

If intent were required to award treble damages in the first instance, there likely would be no need to include these exceptions for relying on government or contractor statements, because doing

so would automatically negate the intent requirement. *See Southern Nev. Homebuilders v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (explaining that this court interprets statutory provisions in harmony with the statutory scheme and to avoid absurd results). Accordingly, we conclude that the treble damages provision of NRS 113.150 does not expressly or implicitly require a heightened level of mental culpability.

Treble damages awarded under NRS 113.150(4) are remedial, not punitive

[Headnote 4]

Nonetheless, Celebrate argues that even if NRS 113.150(4) is silent on a mental culpability requirement, the Legislature must have intended to include such a requirement because treble damages are punitive in nature, and obtaining punitive damages requires proof of intentional wrongdoing. *See, e.g.*, NRS 42.005(1) (governing statutory punitive damages and expressly requiring ''clear and convincing evidence that the defendant has been guilty of *oppression, fraud or malice*'' (emphasis added)). But even if all punitive-natured damages require proof of intentional wrongdoing, we conclude that NRS 113.150(4) does not, because it is not strictly punitive in nature.

[Headnotes 5, 6]

Punitive damages are awarded not as compensation to the victim but to punish the offender for severe wrongdoing. *Bongiovi v. Sullivan*, 122 Nev. 556, 580, 138 P.3d 433, 450 (2006). In contrast to punitive damages, as recognized by the United States Supreme Court, ''it is important to realize that treble damages have a compensatory side, serving remedial purposes in addition to punitive objectives.'' *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 130 (2003). Indeed, as one commentator has expressed, ''[t]reble damages are not easily characterized because they contain both punitive and remedial elements. Despite the hybrid nature of treble damages, at least one-third of treble damages is remedial; the jury finds those damages necessary to compensate the victim for his loss.'' Robert S. Murphy, *Arizona RICO, Treble Damages, and Punitive Damages: Which One Does Not Belong?*, 22 Ariz. St. L.J. 299, 302 (1990) (internal footnotes omitted). For example, the United States Supreme Court has found a provision awarding treble damages for antitrust violations remedial, based not only on legislative remarks, but also because the provision '' 'ma[de] awards available only to injured parties, and measure[d] the awards by a multiple of the injury actually proved . . . .' '' *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 635-36 (1985) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-86 (1977)).

[Headnotes 7-9]

Some jurisdictions have generally concluded that statutory treble damages are penal;[2] however, ''cases have placed different statutory treble-damages provisions on different points along the spectrum between purely compensatory and strictly punitive awards.'' *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401, 405 (2003) (referring to several United States Supreme Court cases that explain the nature of treble damages). ''[T]he tipping point between payback and punishment defies general formulation [and is] dependent on the workings of a particular statute and the course of particular litigation . . . .'' *Cook County*, 538 U.S. at 130. As the District of Columbia Court of Appeals explained,

> Statutory provisions for double or treble damages often do serve the same purposes as punitive damages. . . . When the award of multiple damages is intended to serve penal purposes, it is a substitute for punitive damages, and the same or similar proof requirements usually must be satisfied. . . .
>
> On the other hand, multiple damages provisions may be enacted to serve remedial rather than punitive purposes, such as ensuring full compensation or encouraging private enforcement of the law . . . . When treble damages are awarded for remedial purposes, they are not a substitute for punitive damages and the heightened proof requirements for punitive damages do not apply.

District Cablevision Ltd. v. Bassin, 828 A.2d 714, 726-27 (D.C. 2003) (internal citations omitted). Based on these considerations, we decline to declare that treble damages are per se punitive. Rather, we look to NRS 113.150(4) to determine whether an award of treble damages under that statute is intended to penalize or compensate. *See Cook County*, 538 U.S. at 130; *see also Barth v. Canyon County*, 918 P.2d 576, 581 (Idaho 1996) (explaining that ''[w]hen a statute allows an award beyond actual damages, [a court] must decide whether the award is intended to be a penalty or compensation'').

While NRS 113.150 does not characterize the treble damages as a penalty or compensation, it is significant that the Legislature declined to include a mental state element within the statute. It appears that the overriding purpose of NRS 113.150 is to create a statutory private right of action to award a victim adequate com-

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[2]*See, e.g.*, *Southway Corp. v. Metropolitan Realty*, 206 S.W.3d 250, 257 (Ark. Ct. App. 2005); *Imperial Merchant Services, Inc. v. Hunt*, 212 P.3d 736, 744 (Cal. 2009); *Goodrow v. Lane Bryant, Inc.*, 732 N.E.2d 289, 299 (Mass. 2000); *Cole v. Wilson*, 661 N.W.2d 706, 710 (Neb. Ct. App. 2003); *Debra F. Fink v. Ricoh Corp.*, 839 A.2d 942, 980 (N.J. Super. Ct. Law Div. 2003); *Heights Associates v. Bautista*, 683 N.Y.S.2d 372, 374 (App. Term 1998); *Maxwell v. Samson Resources Co.*, 848 P.2d 1166, 1172 (Okla. 1993); *Tri-Tech Corp. v. Americomp Services*, 646 N.W.2d 822, 827 (Wis. 2002).

pensation to remedy an error or omission in disclosures made in the sale of a personal residence. On its face, the statute is more concerned with compensating the victim than with penalizing a defendant's conscious wrongdoing. *See Barth*, 918 P.2d at 582 (concluding that an award of treble damages was not a penalty when a particular statute did not refer to ''penalty'' in its title or body); *see also Bullman v. D & R Lumber Co.*, 464 S.E.2d 771, 776 (W. Va. 1995) (concluding that a statute that awarded treble damages was not punitive in nature because it was concerned with the prohibitive conduct, ''not with the state of mind of the wrongdoer,'' and explaining that ''[t]he statute does not directly or indirectly speak to punishment or penalties, but refers entirely to damages suffered by the plaintiff[, and t]hus, we find the overriding purpose of the treble damages provision is to award the victim adequate compensation'').

There is no indication that the Legislature intended to require a heightened level of mental culpability for claims brought pursuant to NRS 113.150(4). Because it appears that the nature of the damages are concerned with the prohibitive conduct of the seller rather than his state of mind, we conclude that treble damages awarded pursuant to that statute are remedial, not punitive in nature. Thus, we reject Celebrate's argument that we must imply an element of mental culpability.

In this case, the parties do not dispute that Celebrate knew of the soil defect problem and failed to disclose that defect to Webb when he purchased the residence. Therefore, the district court properly awarded as damages against Celebrate treble the amount of Webb's costs to repair or replace the defect, and we affirm that portion of the district court's judgment.

The district court failed to sufficiently support its conclusion that Shull was not the alter ego of Celebrate

Webb argues that the district court abused its discretion when it found that he failed to prove that Shull was Celebrate's alter ego under NRS 78.747. That statute provides that a stockholder, director, or officer is not liable for the debt of a corporation, unless the corporation is influenced and governed by the individual, the corporation and the individual are inseparable from each other through unity of interest and ownership, and adherence to the corporate fiction of a separate entity would sanction fraud or promote a manifest injustice. NRS 78.747.[3] ''The district court's determi-

[3]The parties assume that NRS 78.747, which is part of the statutory chapter governing corporations, applies to the alter ego assertion against Shull and Celebrate, an LLC. Accordingly, for purposes of this appeal, we likewise assume, without deciding, that the statute applies and analyze their alter ego arguments under that standard. *See Montgomery v. eTreppid Technologies, LLC*, 548 F. Supp. 2d 1175, 1180-81 (D. Nev. 2008) (recognizing that federal and

nation with regard to the alter ego doctrine will be upheld on appeal if substantial evidence exists to support the decision.'' *Lorenz v. Beltio, Ltd.*, 114 Nev. 795, 807, 963 P.2d 488, 496 (1998).

In this case, the district court made several findings that relate to Webb's alter ego claim, including that Shull was a managing member of Celebrate; that Shull purchased the home at issue in his own name and then sold it to Celebrate for one dollar, with Shull's name remaining on the mortgage; that Shull had been a managing member of at least 70 single-transaction limited liability companies, which were created to handle only one transaction and then close; that the financial statements provided by Celebrate showed numerous loan transactions between Shull's many different business entities; and that Celebrate was out of business. Webb maintains that each of these findings supports a conclusion that Shull was the alter ego of Celebrate. However, the district court concluded, without explanation, that Webb failed to prove that Shull is an alter ego of Celebrate Properties.

Because the district court failed to articulate its reasoning, we are unable to review whether the district court abused its discretion. Our review is further hindered by the district court's findings of fact that appear to be at odds with its decision. Since the district court failed to explain its reasoning for denying alter ego status, it is unclear what evidence the district court considered in reaching its decision or whether it reached its conclusion in error.[4] Accordingly, we remand this matter to the district court for it to make findings and conclusions as to whether Shull was the alter ego of Celebrate. *See Frantz v. Johnson*, 116 Nev. 455, 470-71, 999 P.2d 351, 361 (2000) (remanding because the district court entered judgment without considering an applicable statute); *see also Wilford v. Wilford*, 101 Nev. 212, 215, 699 P.2d 105, 107 (1985) (''The district court . . . is required to make specific findings of fact sufficient to indicate the basis for its ultimate conclusions.'').

For the reasons stated above, we affirm the district court's judgment, except for the portion of the judgment concerning the alter ego issue, which we vacate. We remand the matter to the district court for further proceedings consistent with this opinion.

DOUGLAS and PARRAGUIRRE, JJ., concur.

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state courts have consistently applied to LLCs corporate laws for piercing the corporate veil under the alter ego doctrine); *In re Giampietro*, 317 B.R. 841, 845-46 (Bankr. D. Nev. 2004) (recognizing that whether the alter ego/corporate veil doctrine applies to LLCs in Nevada is a question of first impression).

[4]Indeed, even respondents argue that ''there being no trial transcript and scant trial exhibits in the record, it is impossible for [this c]ourt to determine whether [the district court's alter ego] finding was clearly erroneous and not supported by substantial evidence.''